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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**DAVID GALCERAN and ED TEEL,**
*Petitioners,*
*vs.*
**EDWARD JOSEPH HARDING,**
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a Federal Court of Appeals may save an untimely civil rights action by fashioning a federal tolling rule from a statutory provision within a state's tort claims act, when the act has consistently been held by federal and state decisions to be inapplicable to actions under 42 U.S.C. Section 1983?

2. Whether a state statute may be fairly construed as inconsistent with federal law under 42 U.S.C. Section 1988 when it is confined in application to actions under a state tort claims act?

## PARTIES TO THE PROCEEDING

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No. _____

In The
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October Term, 1989

**DAVID GALCERAN and ED TEEL,**
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# PETITION FOR WRIT OF CERTIORARI

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The petitioners, David Galceran and Ed Teel, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the proceeding on November 16, 1989.

## OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 889 F.2d 906 and is reprinted in the Appendix A hereto, pages A-1 to A-9, *infra*.

The memoranda of decision and orders of the United States District Court for the Central District of California (Rymer, D.J.) have not been reported. They are

reprinted in the Appendix B hereto, pages B-1 to B-11, *infra* and pages B-12 to B-14, *infra*.

## JURISDICTION

The judgment and opinion of the Court of Appeals for the Ninth Circuit were entered on November 16, 1989. The Court of Appeals denied a timely petition for rehearing and rejected the suggestion of rehearing en banc on February 14, 1990. Please see Appendix C, page C-1, *infra*.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, article VI, clause 2:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The statutory provisions involved are respectively set forth in Appendices D, E and F, pages D-1 to F-1, as follows:

The Civil Rights Act of 1871, 42 U.S.C. Section 1983

The Civil Rights Act of 1866, 42 U.S.C. Section 1988

California Tort Claims Act of 1963, California Government Code Section 945.3

California Code of Civil Procedure, Section 340

## STATEMENT OF THE CASE

Alleging federal jurisdiction under 42 U.S.C. Section 1983, the respondent commenced this damage action against the petitioners, individually and in their official capacities as Sheriff's deputies for the County of Los Angeles, on May 1, 1987. His allegations related to an incident which took place at the San Dimas Sheriff's station on October 10, 1984, in which the respondent was physically ejected from the station after creating a disturbance. A short time later that day, the respondent made threatening and abusive telephone calls to the station.

On October 11, 1984, a misdemeanor complaint was filed, charging the respondent with disturbing the peace, obstructing a peace officer in the performance of his duties, challenging a person in a public place to fight, and making threatening telephone calls. On May 2, 1986, the respondent was acquitted of pending criminal charges.

Nearly a year later, the respondent alleged in his first cause of action that petitioners used excessive force in ejecting him from the Sheriff's station and violated his right to freedom of speech under the First and

Fourteenth Amendments to the United States Constitution. In his second cause of action, he alleged that his physical ejection from the station by petitioners was in furtherance of a conspiracy to deprive him of equal protection of the laws or equal privileges and immunities thereunder.

The respondent was never held in custody on criminal charges arising from the incident on October 10, 1984. He never presented a claim to the County of Los Angeles under the California Tort Claims Act, California Government Code Section 810, *et seq.*, in connection with the incident. His complaint alleged claims solely under 42 U.S.C. Section 1983. No pendent state law claims were alleged. See Appendix B, page B-15 to B-16, *infra.*

Petitioners moved for summary judgment on various grounds, including their affirmative defense that the first two causes of action were barred by the one-year limitation period set forth in California Code of Civil Procedure Section 340(3), which governs actions under 42 U.S.C. Section 1983 in California. See Appendix F, page F-1, *infra.* The district court granted summary judgment on the ground that the first two causes of action were barred by the statute of limitations. See Appendix B, pages B-4 to B-5, *infra.*

In view of the fact that the respondent's first two causes of action accrued before *Wilson v. Garcia*, 471 U.S. 261 (1985) was decided, the district court had determined that the causes of action accrued April 17, 1986, one year after the *Wilson* decision, in accordance with *Cabrales v. County of Los Angeles*, 644 F. Supp. 1352, 1356 (C.D. Cal. 1986). Having commenced his action on May 1, 1987, respondent's first two causes of action were thus untimely. See Appendix B, pages B-4 to B-5, *infra.*

Respondent unsuccessfully argued before the district court that a provision in California Government Code Section 945.3 tolled the running of the limitation period under California Code of Civil Procedure Section 340(3). This statute was added to the California Tort Claims Act in 1981 and was amended in 1983 to provide principally that no person charged with a criminal offense may bring a civil action for damages against a peace officer or his public employer based on the peace officer's conduct in connection with the pending criminal charge. Among other ancillary provisions, it further provides that any applicable statute of limitations is tolled during the pendency of the charges in state trial courts. See Appendix E, page E-1, *infra*.

The 1983 amendment to statute made clearer that it did not relieve a potential civil litigant from complying with claim presentation requirements under the Act. Petitioners maintained below that provisions of the California Tort Claims Act are inapplicable to actions under 42 U.S.C. Section 1983.

Acknowledging that the tolling of the statute of limitations for an action under 42 U.S.C. Section 1983 was usually governed by state law, the district court ruled that the tolling provision within California Government Code Section 945.3 nonetheless did not apply because substantive policy considerations underlying 42 U.S.C. Section 1983 would otherwise be defeated. Relying on *Mangels v. City of Orange*, 678 F. Supp. 1452 (C.D. Cal. 1988) as authority for this proposition, the district court further noted that there was nothing in the record to suggest that respondent's failure to commence his action was due to California Government Code Section 945.3. See Appendix B, page B-5 and note 1, *infra*.

In considering additional arguments by respondent, the district court later observed that the record also did

not support his assertion that peace officers generally press for the filing of baseless criminal charges against potential civil plaintiffs. But, to the extent that such an assertion was true, the district court noted:

> ". . . the rule adopted by this court in *Mangels v. City of Orange*, 678 F.Supp. 1452 (C.D. Cal. 1988) should have a salutory [*sic*] effect by preserving the availability of accused citizen's civil rights." (Appendix B, page B-13, note 2, *infra*)

On September 21, 1988, the respondent filed a notice of appeal. He thereafter prosecuted his appeal only as to his first and second causes of action, which were directed solely at petitioners.

In its opinion, filed November 16, 1989, the Court of Appeals for the Ninth Circuit agreed that, unless the time was tolled, respondent's first two causes of action were time-barred. It then held that they were saved by the tolling provision in California Government Code Section 945.3.

Although the Ninth Circuit opinion did not discuss the California Tort Claims Act, it relied on *Felder v. Casey*, __ U.S. __, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), which involved a challenge to pre-litigation requirements of the Wisconsin statute governing liability of public entities and employees, for the proposition that under the Supremacy Clause of the Federal Constitution, such state law must yield when there is a conflict with valid federal law. *Harding v. Galceran*, 889 F.2d 906, 908 (9th Cir. 1989) (Appendix A hereto, *infra*). Inasmuch as *Williams v. Horvath*, 16 Cal.3d 834, 129 Cal.Rptr. 453, 548 P.2d 1125 (1976), has stood for essentially the same proposition in California, petitioners had argued below that provisions of the California Tort

Claims Act have generally not been applied by federal and state courts to actions under 42 U.S.C. Section 1983. Petitioners have consistently taken the position below that California Government Code Section 945.3 is confined in application to actions under the Tort Claims Act and does not apply to actions under 42 U.S.C. Section 1983.

The Ninth Circuit viewed the district court as having decided that:

> ". . . because the prohibitory provision of section 945.3 conflicted with the policies behind section 1983, Harding's claims were not tolled by section 945.3's tolling provision." *Harding v. Galceran, supra*, 889 F.2d at 908. (Appendix A hereto, *infra*)

Disagreeing with this proposition, the Ninth Circuit held that, although the prohibitory provision in California Government Code Section 945.3 fell under the Supremacy Clause, the tolling provision did not similarly fall and thus tolled the statute of limitations as to respondent's first two causes of action under 42 U.S.C. Section 1983. *Id.*

The Ninth Circuit opinion stated that federal courts look to state law to determine the application of tolling rules under *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). Referring to California Code of Civil Procedure Section 340(3), the opinion concluded that:

> ". . . the one-year limitation period applied to section 1983 claims in California is interrelated to the policies behind the tolling provision expressed in section 945.3." *Harding v. Galceran, supra*, 889 F.2d at 908.

The Ninth Circuit opinion discussed one California appellate opinion in connection with the objectives of the California legislative in enacting California Government Code Section 945.3. *McMartin v. County of Los Angeles*, 202 Cal.App.3d 848, 249 Cal.Rptr. 53 (Ct. App. 1988). These objectives were described as eliminating civil damage actions as plea bargaining levers in state criminal proceedings and preventing their use as a discovery device for criminal defense preparations. *Id.*, 202 Cal.App.3d at 854-856, 248 Cal.Rptr. at 55-56.

Notwithstanding that the prohibitory provisions of California Government Code Section 945.3 cannot apply in the face of the Supremacy Clause, the Ninth Circuit opined that these objectives can be served by tolling the statute of limitations for actions under 42 U.S.C. Section 1983 while criminal charges are pending against a potential plaintiff. If the statute of limitations was not tolled for such actions in these specific circumstances, the objectives and the interrelationship perceived by the Ninth Circuit between California Code of Civil Procedure Section 340(3) and the tolling provision of California Government Code Section 945.3 would go unserved. *Harding v. Galceran, supra*, 889 F.2d at 909 (Appendix A hereto, *infra*).

In finding no inconsistency under *Board of Regents v. Tomanio, supra*, between the perceived purposes of the tolling provision and the policies behind 42 U.S.C. Section 1983, the Ninth Circuit gave four ways in which these policies are served by tolling the statutory period for actions under 42 U.S.C. Section 1983 in the circumstances when criminal charges are pending against the potential plaintiff. First, more time is thereby afforded to commence the action. Second, the additional time serves the policies of deterrence and compensation.

> "Third, since federal law requires this court to apply state tolling rules, application of section 945.3's tolling provision ensures consistent adjudication in state and federal courts." *Harding v. Galceran, supra*, 889 F.2d at 909.

The final way, which the Ninth Circuit opinion deemed most important, was that tolling the statute of limitations would encourage a criminal defendant to await the outcome of the criminal action before commencing an action under 42 U.S.C. Section 1983. It was suggested that this would reduce litigation of civil rights claims. *Harding v. Galceran, supra*, 889 F.2d at 909.

Reversing the summary judgment as to respondent's first two causes of action and remanding these causes to the district court, the Court of Appeals for the Ninth Circuit summarized that, under the Supremacy Clause, the prohibitory provision could not have prevented the respondent from commencing his civil rights action against the petitioners while criminal charges were pending against him. But the tolling provision within California Government Code Section 945.3 passed muster under the Supremacy Clause and tolled the time during which criminal charges were pending against petitioner, making his first two causes of action timely.

Petitioners filed a timely petition for rehearing with a suggestion for rehearing en banc. They urged that a material point of law was overlooked or misapprehended in the Ninth Circuit judgment and opinion. Petitioners asserted on petition for rehearing that the special tolling provision within California Government Code Section 945.3 is not one of the coordinate tolling provisions for the statute of limitations governing federal civil rights

action, which provisions are set forth in the California Code of Civil Procedure.

Petitioners further argued that, in construing the special tolling provision within the California Tort Claims Act to interrelate to California Code of Civil Procedure Section 340(3), the Ninth Circuit opinion appeared to conflict with decisions of this Court, as well as other decisions of the Ninth Circuit. The petition for rehearing was denied on February 14, 1990.

## REASONS FOR GRANTING THE WRIT

### I

### THE COURT OF APPEALS HAS FASHIONED A FEDERAL TOLLING RULE BY MEANS WHICH CONFLICT WITH SETTLED LINES OF DECISION OF THIS COURT AND OF THE NINTH CIRCUIT

The decision herein and means by which the Court of Appeals for the Ninth Circuit reached the decision significantly depart from decisions and principles established by this Court in *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) and *Wilson v. Garcia* 471 U.S. 261 (1985). The *Tomanio* and *Wilson* decisions had served federal interests of uniformity, certainty, and minimization of unnecessary litigation which this recent Ninth Circuit decision threatens to undermine. Just as the search for the most appropriate statute of limitations to govern federal civil rights action in the various circuits appeared over, the Ninth Circuit appears disposed to apply any available tolling provision to toll that statute in California. The considerable and desirable degree of

predictability wrought by the *Tomanio* and *Wilson* decisions in this area of civil rights law has been unnecessarily impaired by the decision herein. Moreover, the means used by the Ninth Circuit to reach its decision have included ignoring legitimate state interests as well as settled law in federal and state courts of the Ninth Circuit. All these factors warrant a further consideration of the federal questions involved by this Honorable Court.

In *Board of Regents v. Tomanio, supra*, 446 U.S. at 483-484, this Court held that, in borrowing the most appropriate state statute of limitation to govern a federal civil rights action, the federal courts should apply the coordinate state tolling rules for that statute. The approach essentially prescribed by the Court was to identify the coordinate rule of tolling once the appropriate statute of limitations was determined and then to determine whether that rule was inconsistent with federal law. The Court found that New York had codified the limitation of actions and the coordinate tolling rules together. *Id.* at 486. So has California in California Code of Civil Procedure Sections 312 to 365. Noting that the New York statute had codified various common law tolling rules for infancy, insanity, imprisonment, and the defendant's absence from the state, this Court nonetheless found no coordinate state tolling rule in the New York Civil Practice Law which could toll Ms. Tomanio's federal civil rights action under the circumstances.

This Court emphasized that, as applied to actions under 42 U.S.C. Section 1983, a state statute of limitations and its coordinate tolling rules are "binding rules of law in most cases." *Id.* at 484. The Court further observed that the state policies of repose underlying statutes of limitation were not generally disfavored in federal law. *Id.* at 488. Relying on *Johnson v. Railway*

*Express Agency, Inc.*, 421 U.S. 454 (1975) and *Robertson v. Wegmann*, 436 U.S. 584 (1978), the Court concluded essentially that the lack of a coordinate state tolling rule fitting Ms. Tomanio's circumstances was not inconsistent with the provisions of 42 U.S.C. Section 1983.

State law had been acknowledged to be the primary, though not the exclusive, guide for federal courts in this area by *Johnson, supra*, 421 U.S. at 465. *See* 42 U.S.C. Section 1988 (Appendix D, page D-2, *infra.*) Thus guided, this Court in *Tomanio, supra*, preferred to follow the "often complex combination of limitations and tolling provisions" actually enacted by the state, rather than an ad hoc federal rule of tolling created by the Federal Court of Appeals. *Id.* at 491-492.

While the Ninth Circuit decision herein purported to interpret a state statute having apparent reference to respondent's circumstances, *i.e.* a person charged with criminal offenses, the interpretation has essentially created an ad hoc federal rule of tolling not unlike that created by the Second Circuit in the *Tomanio* case. Recently, this Court described that ad hoc federal rule in *Tomanio* as "not contained among the tolling provisions the state legislature had codified with its limitations periods." *Hardin v. Straub*, __ U.S. __, 109 S.Ct. 1998, 2001, 104 L.Ed.2d 582 (1989). Neither has California Government Code Section 945.3 been codified with the general statutes of limitations set forth in the California Code of Civil Procedure. It is simply not a coordinate tolling rule and neither underlies nor is codified with the general statute of limitations governing actions under 42 U.S.C. Section 1983 in California.

Rather, it is a special tolling rule within a statutory provision of the California Tort Claims Act, California Government Code Sections 810, *et seq.* This special

tolling rule clearly draws its purpose solely from the so-called prohibitory portion of California Government Code Section 945.3. Notwithstanding the purposes claimed for it by the Ninth Circuit after construing away other portions of the statute, the special tolling rule is purely ancillary and truly has no purpose standing alone.

In this respect, the Ninth Circuit opinion introduces a troubling and expansive interpretation of *Board of Regents v. Tomanio, supra.* It appears to reduce *Tomanio* to the proposition that a tolling rule, whatever its source, purpose or application in state statutes, must be applied to actions under 42 U.S.C. Section 1983 when it is not inconsistent with the Constitution or other federal law. In considering an Arizona tolling statute, however, the Ninth Circuit in *Major v. Arizona State Prison*, 642 F.2d 311, 313 (9th Cir. 1981), had stated:

> "A state legislative enactment is not to be literally or mechanically applied by federal courts. Rather, a federal court charged with application of a state law must enlist the aid and guidance provided by that state's courts whose responsibility it is, in the first instance to interpret and construe the statute."

Federal courts are generally bound by a state court's construction of the laws of that state, including state statutes of limitation and tolling provisions for actions under 42 U.S.C. Section 1983. *Stephan v. Dowdle*, 733 F.2d 642 (9th Cir. 1984). *See May v. Enomoto*, 663 F.2d 164 (9th Cir. 1980).

The Ninth Circuit opinion herein only discussed briefly one state appellate opinion, *McMartin v. County of Los Angeles*, 202 Cal.App.3d 848, 249 Cal.Rptr. 53 (Ct. App. 1988), which had upheld the constitutionality of the 1983 amendment to California Government Code

Section 945.3. *Harding v. Galceran, supra*, 889 F.2d at 908-909. This point was not discussed, however, nor was any mention made of the California Tort Claims Act, of which California Government Code Section 945.3 is an integral part. It performs "the same goals as the rest of the claim filing statutes." *McMartin v. County of Los Angeles, supra*, 202 Cal.App.3d at 858, 249 Cal.Rptr. 53. Although the California Supreme Court has not yet construed California Government Code Section 945.3, California courts have recognized it to be "a component of the government tort claims statutes." *McAlpine v. Superior Court*, 209 Cal.App.3d 1, 7, 257 Cal.Rptr. 32 (Ct. App. 1989).

The legislative integration of California Government Code Section 945.3 in the California Tort Claims Act has historical and doctrinal significance to the issues under consideration by this Court. It also underscores the absence of any mention of the Act in the Ninth Circuit opinion.

The California Tort Claims Act was enacted in 1963 and codified in the California Government Code, Section 810, *et seq.* The Act has been long recognized by federal and state courts to set forth statutory remedies and procedures which are separate and independent from those of the Civil Rights Act of 1871, codified as 42 U.S.C. Section 1983. Before passage of the Tort Claims Act in California, it was settled that provisions of the California Code of Civil Procedure governed limitation of actions under 42 U.S.C. Section 1983 in California. *Smith v. Cremins* 308 F.2d 187 (9th Cir. 1962). After passage of the Tort Claims Act, the Court of Appeals for the Ninth Circuit rejected arguments that time limitations for actions under 42 U.S.C. Section 1983 should be governed by the requirements of the Tort Claims Act and concluded that "it would be singularly inappropriate to

fashion a federal procedural detail by any reference to it." *Willis v. Reddin*, 418 F.2d 702, 705 (9th Cir. 1969).

The federal courts had uniformly found provisions of the California Tort Claims Act to be inapplicable to actions under 42 U.S.C. Section 1983 in California. *Martinez v. State of California*, 444 U.S. 277, 284 and n.8 (1980). *Donovan v. Reinbold*, 433 F.2d 738, 741-742 (9th Cir. 1970). *Ney v. State of California*, 439 F.2d 1285, 1287 (9th Cir. 1971). *May v. Enomoto*, *supra*. *Guillory v. County of Orange*, 731 F.2d 1379, 1382 (9th Cir. 1984).

In *Williams v. Horvath*, 16 Cal. 3d 834, 838-842, 129 Cal.Rptr. 453, 548 P.2d 1125 (1976), the California Supreme Court reviewed the earlier federal cases above and relied upon them to hold that the claim provisions of the California Tort Claims Act do not apply to actions under 42 U.S.C. Section 1983. In considering the question whether any provisions of California Government Code Section 900, *et seq.*, applied to actions under 42 U.S.C. Section 1983, the California Court of Appeal in *Rossiter v. Benoit*, 88 Cal.3d 706, 713, 152 Cal.Rptr. 65 (Ct. App. 1979), stated:

> The *Williams* case decided Government Code section 911.2 claims presentation requirement need not be met in order to file an action based on 42 United States Code section 1983. The language is broad enough in our opinion to embrace the proposition that no part of the California Tort Claims Act, including but not limited to the statute of limitations stated therein, is applicable when the federal Civil Rights Act is invoked and so hold.

Prior to the Supreme Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), some basic principles had evolved in the Ninth Circuit with respect to applying California's statutes of limitations to federal civil rights action. The federal courts had not applied *any* such provisions in the California Tort Claims Act to actions under 42 U.S.C. Section 1983. Neither had the state courts. The federal courts have virtually always applied the provisions of the California Code of Civil Procedure in cases involving application of state statutes of limitation to such federal causes of action. So have the state courts. The federal courts found the appropriate statutes of limitations and the coordinate tolling rules codified together in the California Code of Civil Procedure, just as the Supreme Court had found them in the New York Civil Practice Law in *Board of Regents v. Tomanio, supra*, 446 U.S. at 486 n.6. It is also significant that these basic principles were well settled when the California Legislature enacted California Government Code Section 945.3 in 1981 as a new provision of the California Tort Claims Act. *See Estate of McDill*, 14 Cal.3d 831, 839, 122 Cal.Rptr. 754, 537 P.2d 874 (1975).

*Wilson v. Garcia, supra*, and its progeny should not have eroded these basic principles. Although the *Wilson* decision caused the limitation period to become one year under California Code of Civil Procedure Section 340(3), it did not prescribe a departure from the recognized statutory source for limitations periods and the coordinate tolling rules governing federal civil rights actions in California.

Indeed, the Supreme Court in *Wilson* rejected the petitioners' argument that the statute of limitation set forth in the New Mexico Tort Claims Act was the most appropriate statute to govern federal civil rights actions in New Mexico. Taking into account the numerous and

diverse kinds of Section 1983 claims, the Supreme Court concluded that the state limitation period for general personal injury actions was the most appropriate limitation to be applied to federal civil rights actions. The Court further observed that such actions comprise the greater volume of civil litigation in the state courts, just as they probably did in 1871 when Section 1983 was enacted.

> "It is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect." *Id.* at 279.

This proposition should also apply to coordinate state tolling rules, based on the Court's view that the state statute of limitations for a particular cause of action is interrelated with the tolling provisions affecting that cause of action. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-464 (1975).

The Ninth Circuit opinion herein departs from the teaching of *Board of Regents v. Tomanio, supra*, and *Wilson v. Garcia, supra*. It also runs counter to federal and state decisions holding provisions of the California Tort Claims Act inapplicable to the actions under 42 U.S.C. Section 1983. The decision herein is contrary to the settled line of decision in the federal courts, holding state or public liability statutory schemes inapplicable to actions under 42 U.S.C. Section 1983.

## II

## THE STATUTORY CONSTRUCTION EMPLOYED BY THE COURT OF APPEALS PRESUMED THAT THE STATE TOLLING RULE APPLIED, DISREGARDED LEGISLATIVE HISTORY AND JUDICIAL DECISIONS TO THE CONTRARY, AND CONFLICTED WITH THE TEACHING OF THIS COURT

This Court concluded in *Wilson v. Garcia, supra*, 471 U.S. at 275, that 42 U.S.C. Section 1988 may be "fairly construed as a directive to select, in each state, the one most appropriate statute of limitations for all § 1983 claims." See Appendix D, page D-1, *infra*. Although *Board of Regents v. Tomanio, supra*, indicates that the choice of the most appropriate statute of limitation has a definite bearing on the coordinate tolling rules to be applied by federal courts, the same directive may be applied to state tolling rules.

In *Wilson v. Garcia, supra*, this Court followed the analysis under 42 U.S.C. Section 1988 prescribed in *Burnett v. Grattan*, 468 U.S. 42 (1984). The second step of the *Burnett* analysis entailed consideration of the application of state common law, as modified and changed by the constitution and statutes of the forum state. *Id.* at 47. In holding a Maryland state statute governing the limitation of administrative proceedings inapplicable to Section 1983 claims, the Court noted that the third step of the analysis — whether a state rule of decision is inconsistent with the Constitution of federal law — may involve an unnecessary inquiry under the

circumstances of a given case. As an example of where federal courts must undertake such an inquiry, the Court gave the example of a state enacting a statute of limitation specifically applicable to federal civil rights actions. *Id.* at 45, n.15. Petitioners urge that such an inquiry was also unnecessary herein.

Following *Wilson v. Garcia, supra*, the appropriate statute of limitations governing federal civil rights actions in California — California Code of Civil Procedure Section 340(3) — was mandated in 1985. *Cabrales v. County of Los Angeles*, 644 F. Supp. 1352, 1354 (C.D. Cal. 1986). *See Usher v. City of Los Angeles*, 828 F.2d 556 (9th Cir. 1987). *See also Del Percio v. Thornsley*, 877 F.2d 785 (9th Cir. 1989). The statutory language relied upon to establish Section 340(3) as the appropriate statute of limitations was added in approximately 1905. Coordinate tolling provisions had been largely enacted in 1872, *i.e.* California Code of Civil Procedure Section 352.

In 1981, the California Legislature added California Government Code Section 945.3 to the California Tort Claims Act provisions governing actions thereunder against public entities and employees. The primary objectives of the enactment were concededly to eliminate the use of civil damage complaints as plea bargaining levers and to prevent use of civil false arrest suits as a discovery device to inquire into prosecutorial materials and investigative information during the pendency of criminal proceedings. *Mohlmann v. City of Burbank*, 179 Cal.App.3d 1037, 1042, 225 Cal.Rptr. 109 (Ct. App. 1986). Some uncertainty and controversy arose as to whether the original enactment was intended to suspend claim presentation requirements as well as actions under the California Tort Claims Act. *Id.*

Therefore, California Government Code Section 945.3 was amended and clarified in 1983. It is set forth in full at Appendix E, page E-1, *infra*. In holding the amended Government Code Section 945.3 constitutional, the California Court of Appeal stated that it bore a rational relationship to a legitimate state purpose and served "the same goals as the rest of the claim filing statutes." *McMartin v. County of Los Angeles*, 202 Cal.App.3d 848, 858, 249 Cal.Rptr. 53 (Ct. App. 1988). No reported state court case has involved application of Government Code Section 945.3 to an action under 42 U.S.C. Section 1983.

California Government Code Section 945.3 neither applies nor purports to apply by its express terms to actions brought under the federal Civil Rights Acts. *See Burnett v. Grattan, supra*, 468 U.S. at 53, n.15. Although the court in *Mangels v. City of Orange*, 678 F. Supp. 1452, 1454 (C.D. 1988), observed that its language did not limit its scope to state law claims, the Tort Claims Act contains other general references to suits or claims for money or damages, which have not been construed to apply to the federal Civil Rights Acts. Moreover, the Tort Claims Act contains no reference to federal civil rights actions. And the Act has been repeatedly construed by federal and state courts to be inapplicable to such actions.

Other than acknowledging the legislative objectives behind California Government Code Section 945.3, the Court of Appeals for the Ninth Circuit appeared to give little to no consideration to the legislative history and judicial decisions relating to the enactment. In particular, no apparent heed was paid to the fact that the California Legislature must be presumed to have had knowledge of existing judicial decisions construing the California Tort Claims Act when it enacted California

Government Section 945.3 as part of the Act. *Estate of Mc Dill*, 14 Cal.3d 831, 839, 122 Cal.Rptr. 754, 537 P.2d 874 (1975).

The Court of Appeals appears to have presumed, rather than construed, that California Government Code Section 945.3 applies to actions under 42 U.S.C. Section 1983 and that it is interrelated to the statute of limitations governing such actions in California. There is ample authority to the contrary. The statutory construction employed by the Court of Appeals creates a confusing judicial precedent, which may cause even further confusion in other cases. Review by this Honorable Court is respectfully urged by the petitioners.

## CONCLUSION

For the reasons stated in this petition, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

DATED: May 14, 1990.

Respectfully submitted,

DE WITT W. CLINTON
County Counsel

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Principal Deputy County Counsel

*Attorneys for Petitioners*

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# APPENDIX A

## SPECIAL EARTHQUAKE NOTICE

**This opinion is being filed while the Clerk's office in San Francisco is closed due to severe earthquake damage. Once the Clerk's office is operational, notices will be placed in legal newspapers throughout the Circuit. At that time parties may seek additional time to file a petition for rehearing if they desire to file one.**

## FOR PUBLICATION

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD JOSEPH HARDING,
*Plaintiff-Appellant,*

v.

DAVID GALCERAN; TERRY GINGERICH; LAWRENCE MOSER; JAMES D. CHISIM, et al.,
*Defendants-Appellees.*

No. 88-6484
D.C. No. CV-87-2782-PAR
OPINION

Appeal from the United States District Court
for the Central District of California
Pamela A. Rymer, District Judge, Presiding

Argued and Submitted
October 3, 1989—San Francisco, California

Filed November 16, 1989

Before: Procter Hug, Jr., Jerome Farris and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Hug

## SUMMARY

### Statutes of Limitation

Reversing the district court's grant of summary judgment, the court held that Cal. Gov't Code § 945.3's tolling provision applies to toll the limitations period in a civil rights action while criminal actions are still pending against the potential plaintiff.

Within one year after being acquitted of misdemeanor charges, but more than two years after his claim arose, appellant Edward Harding filed a complaint against appellees Los Angeles Deputy Sheriffs, alleging that the Deputies violated 42 U.S.C.§ 1983 by using excessive force and interfering with Harding's first amendment rights. The district court held that Harding's claims were barred by California's one year statute of limitations for personal injury torts. Harding appealed.

[1] State law determines the statute of limitations for claims brought in a section 1983 action. [2] Harding contended that the statute of limitations was tolled pursuant to Cal. Gov't Code section 945.3. This section prevents civil actions against peace officers from being filed while criminal charges are pending against a potential plaintiff and also tolls the statute of limitations on the civil actions until the criminal charges are resolved. [3] Under the Supremacy Clause, U.S. Const. art. VI, cl. 6, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield. The court concluded that the provision of section 945.3 which absolutely prohibits bringing a civil action against a peace officer while criminal charges are pending against the plaintiff is contrary to the purposes of section 1983 and therefore must fall under the Supremacy Clause. [4] The tolling rule, however, is consistent with the objectives behind section 1983 acions and does not fall under the Supremacy Clause. Section 945.3's tolling provision should have been applied to Harding's section 1983 claims.

## COUNSEL

Richard C. Harding, Pasadena, California, for the plaintiff-appellant.

Patrick T. Meyers, Principal Deputy Counsel, Los Angeles, California, for the defendants-appellees.

## OPINION

HUG, Circuit Judge:

This case involves a dispute between Edward Joseph Harding and Sheriff's deputies David Galceran and Ed Teel (the "Deputies") of the San Dimas Sheriff's substation, Los Angeles, California. The district court found that Harding's claims against the Deputies were barred by the statute of limitations. Because we find that the statute of limitations was tolled, we reverse.

I.

On October 10, 1984, Harding went to the San Dimas Sheriff's substation to pick up a friend who had been arrested. Harding argued with the Deputies at the substation. The Deputies asked Harding to leave and allegedly used excessive force in effecting his departure. After he left, Harding called the Sheriff's substation to complain about the Deputies' actions.

The next day, the Deputies filed a misdemeanor complaint against Harding. The complaint charged Harding with disturbing the peace, obstructing a peace officer in the performance of his duties, challenging a person in a public place to fight, and making threatening phone calls. On May 2, 1986, a jury acquitted Harding of these charges.

On May 1, 1987, Harding filed a complaint against the Deputies. Count 1 of the complaint alleged that the Deputies violated 42 U.S.C. § 1983 by using excessive force and interfering with Harding's First Amendment rights. Count 2 alleged conspiracy to do the same.[1] The district court held that Harding's claims were barred by the statute of limitations and granted the Deputies' motion for summary judgment. That holding is the subject of this appeal.

A dismissal on statute of limitations grounds presents a question of law reviewed *de novo*. *Donoghue v. Orange County*, 848 F.2d 926, 929 (9th Cir. 1988).

II.

[1] Harding's claims are based on the Civil Rights Act, 42 U.S.C. § 1983. State law determines the statute of limitations for claims brought under 42 U.S.C. § 1983. *Wilson v. Garcia*, 471 U.S. 261 (1985). The Court in *Wilson* held the statute of limitations for all section 1983 claims to be the forum state's statute of limitations for personal injury torts. *Id.* at 269. In California, this period is one year. Cal. Civ. Proc. Code § 340(3) (West Supp. 1989).

Harding's claims arose on October 10, 1984. Harding filed his section 1983 claims on May 1, 1987, more than two years after his claims arose, but within one year of his acquittal on the criminal charges. Unless Harding's claims can be saved by a tolling rule, they are time-barred by the statute of limitations. We look to state law to determine the application of tolling doctrines. *Board of Regents v. Tomanio*, 446 U.S. 478, 486-87 (1980).

[2] Harding contends that the statute of limitations was

[1]Harding's complaint also included two malicious prosecution counts, which were dismissed on summary judgment. He does not appeal the dismissal of these claims.

tolled pursuant to Cal. Gov't Code § 945.3 (West Supp. 1989).[2] This section prevents civil actions against peace officers from being filed while criminal charges are pending against the potential plaintiff. The section also tolls the statute of limitations on the civil actions until the criminal charges are resolved. Relying on *Mangels v. City of Orange*, 678 F. Supp. 1452 (C.D. Cal. 1988), which held both parts of section 945.3 inapplicable to section 1983 claims, the district court found the tolling provision inapplicable to Harding's section 1983 claims. The court held that because the prohibitory provision of section 945.3 conflicted with the policies behind section 1983, Harding's claims were not tolled by section 945.3's tolling provision. We disagree. We hold that although section 945.3 may not prohibit a potential plaintiff from bringing a section 1983 claim against a peace officer while criminal actions are pending, section 945.3's tolling provision may still apply to toll the limitations period while criminal actions are pending against the potential plaintiff.

[3] Under the Supremacy Clause, U.S. Const. art. VI, cl. 6, " 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " *Felder v. Casey*, 487 U.S. __, __, 108 S. Ct. 2302, 2306 (1988) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

In *Felder*, the Supreme Court held that a notice-of-claim provision, which was part of a broad legislative scheme gov-

---

[2]Section 945.3 provides in relevant part:

> No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer . . . while the charges against the accused are pending before a justice, municipal, or superior court.
>
> Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending before a justice, municipal, or superior court.

erning Wisconsin's sovereign immunity, was preempted as inconsistent with the purpose and nature of section 1983 actions. The Court stated:

> In enacting section 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability . . . is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law.

*Id.* at 2314. Similarly, we conclude the provision of section 945.3, which absolutely prohibits a party from bringing a civil action against a peace officer while state criminal charges are pending against that party, is contrary to the purposes of section 1983. Accordingly, as applied here, the prohibition in paragraph one of section 945.3 must fall under the Supremacy Clause.

**[4]** Although section 945.3's prohibition on civil actions should not bar a party from bringing a section 1983 action while state criminal charges are pending, it does not necessarily follow that the one-year statute of limitation for section 1983 actions should not be tolled by the tolling rule expressed in section 945.3. Unlike the statute's prohibition on bringing section 1983 claims, the tolling rule is consistent with the objectives behind section 1983 actions. Therefore, the tolling provision does not fall under the Supremacy Clause and should have been applied to Harding's section 1983 claims against the Deputies.

In holding that federal courts should look to state law to determine the application of tolling rules, the Supreme Court stated that:

> [a]ny statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit

> inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interest in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival and questions of application.

*Board of Regents v. Tomanio*, 446 U.S. at 485-86 (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)). Here, the one-year limitation period applied to section 1983 claims in California is interrelated to the policies behind the tolling provision expressed in section 945.3.

The California legislature had two objectives in mind when it enacted section 945.3. The legislature prohibited actions against peace officers while criminal charges were pending to eliminate the use of civil damage complaints as plea bargaining levers. The legislature also sought to prevent the use of civil actions as a discovery device to inquire into prosecutorial information while the criminal charge is pending. *McMartin v. Los Angeles County*, 202 Cal. App. 3d 848, 855-56, 249 Cal. Rptr. 53, 55-56 (1988). Although, under the Supremacy Clause, these policies cannot be served by prohibiting a party from bringing a section 1983 claim, they can be served by tolling the statute of limitations in section 1983 claims when there are criminal charges pending against the potential plaintiff. On the other hand, a refusal to toll the period would ignore the state's policies and the interrelationship between the statute of limitations and the tolling provision.

*Board of Regents v. Tomanio* makes clear that the state tolling provision must be applied when it is not inconsistent with the Constitution or other federal law. *See Maurer v. Los Angeles County Sheriff's Dept.*, 691 F.2d 434, 436 (9th Cir. 1982). We find no inconsistency between the purposes of section

945.3's tolling provision and the policies behind section 1983. To the contrary, tolling the statute when criminal charges are pending against a potential litigant enhances the policies behind section 1983.

Tolling the statutory period while criminal actions are pending gives the party charged more time to file his section 1983 action. Striking down the tolling provision would force a party to defend a criminal action and prosecute a civil action during the same time period. Thus, application of the tolling provision increases a litigant's access to the courts. *Patsy v. Board of Regents,* 457 U.S. 496, 504 (1982) (in enacting section 1983, Congress intended to "throw open the doors of the United States Courts").

Second, there is no inconsistency between the purposes of section 945.3's tolling provision and the policies of deterrence and compensation embodied in section 1983. Indeed, giving a criminal defendant more time to file his section 1983 action would "ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages . . . ." *Felder,* 108 S. Ct. at 2307.

Third, since federal law requires this court to apply state tolling rules, application of section 945.3's tolling provision ensures consistent adjudication in state and federal courts. *Felder,* 108 S. Ct. at 2308-11.

Finally, and perhaps most importantly, while a state prohibition against filing an action cannot prohibit a criminal defendant from filing a section 1983 action against a peace officer while the criminal case is pending, section 945.3 should not be so applied as to force him to do so or lose his cause of action. The tolling period serves the independent policy objective of encouraging the criminal defendant to await the outcome of the criminal action before instituting a section 1983 action. In some cases the delay may result in the avoidance of unmeritorious actions that might otherwise be

costly to all concerned. At the same time, in other cases the delay may help render unnecessary the filing of meritorious actions, if the governmental entity is willing to settle the claim after a full exploration of the facts has occurred in a criminal proceeding.

III.

Under the Supremacy Clause, the prohibition in paragraph one of section 945.3 could not have prevented Harding from bringing his section 1983 claims against the Deputies while criminal charges were pending against him. However, the tolling provision in section 945.3 does not fall under the Supremacy Clause and, therefore, should be applied to Harding's claims. Because the statute of limitations on Harding's section 1983 claims was tolled while criminal charges were pending against him, his section 1983 claims were timely filed.

REVERSED and REMANDED.

# APPENDIX B

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**FILED**
JUN 28 1988
Clerk, U.S. District Court
Central District of California
By Deputy

ENTERED
Clerk, U.S. District Court
JUN 30 1988
Central District of California
By Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

EDWARD JOSEPH HARDING,
Plaintiff,
v.
DAVID GALCERAN, et al.,
Defendants.

NO. CV 87-2782 PAR (Tx)
MEMORANDUM OF DECISION AND ORDER

Plaintiff claims that defendants violated his first amendment and due process rights; jurisdiction is pursuant to 42 U.S.C. § 1983. The claims arise out of an incident at the San Dimas Sheriff Station in which plaintiff was "physically escorted" out of the building after arguing with a sheriff's deputy. Defendants now move for summary judgment.

**Facts Not Genuinely Disputed**

1. On October 19, [*sic*] 1984 plaintiff arrived at the San Dimas Sheriff Station at about 4:30 p.m. to help obtain the release on bail of his colleague Mr. Robert Peverly. Plaintiff spoke to defendant Galceran and became convinced that Galceran was not being as cooperative as possible. Edward Harding Decl. ¶¶ 1-8.

2. Approximately one-half hour later plaintiff, after speaking with defendant Galceran several times, in effect called defendant Galceran a moron: "You know, officer, your attitude reminds me of one of those moronic small town sheriffs that you see on T.V." *Id.* ¶ 22.

3. Plaintiff's version of what subsequently occurred is as follows: "Defendant Galceran jumped up and told me that I was going to leave. He ran around the counter and threw me into a hammerhock hold, propelled me across the lobby, shoved me through ther station doors and catapulted me off the station steps. I landed on the sidewalk on my hands and knees. He told me to get out of there and don't come back." *Id.* ¶ 23.

4. Another officer (defendant Teal), then came over to plaintiff and, according to plaintiff, "grabbed my lapels and ground his foot into my left toe like he was putting out a cigarette. He said, "You get out of here right now. Don't say another word." *Id.* ¶ 27.

5. About fifteen minutes after this incident plaintiff made two telephone calls to the station to complain about defendant's actions. He spoke first with defendant Chism and then spoke with the desk sergeant on duty, defendant Gingerich. In the first conversation plaintiff made several derogatory comments about defendant Galceran and defendant Gingerich hung up on plaintiff. Plaintiff immediately called back and asked about how he could file a complaint against defendant Galcerin and

Teal. He ultimately called Gingerich "a liar" and the conversation once again terminated. The parties do not dispute the basic content of the conversation. Edward Harding Decl. ¶ 29; Gingerich Decl. ¶¶ 4-15; Richard Harding Decl. Exhibit A (Edward Harding Depo.) at 116-17; Chism Decl. ¶¶ 7-13.

6. On October 11, 1984 a misdemeanor complaint was filed charging plaintiff with various violations of the California Penal Code. The charges were disturbing the peace, obstruction of a peace officer in performance of his duties, challenging a person in a public place to fight, and making annoying threatening telephone calls. Gingerich Decl. Exhibit B.

7. On May 2, 1986 plaintiff was acquitted.

8. The original master tape recording of plaintiff's telephone calls to the station after the incident no longer exists. A recording of the recording does exist. According to plaintiff, the existing tape differs from the original in that the first forty seconds of the original is lost and plaintiff's voice is "speeded up." Richard Harding Decl. ¶¶ 9-11, Exhibit A (Edward Harding Depo.) at 123-29.

9. Plaintiff's complaint in this action was filed May 1, 1987.

**Facts Possibly Disputed, But That Are Not Material**

1. Whether defendants destroyed evidence in an attempt to convict plaintiff of the misdemeanor offenses. Because the parties are in substantial agreement on what was said during plaintiff's two telephone calls to the station, and a copy of the tape was made and preserved by the defendants, and there is no evidence that the missing 40 seconds made any difference in the decision to prosecute or the prosecution, whether or not the master was destroyed does not appear in and of itself to create a triable issue of fact.

**Standard**

Fed. R. Civ. P. 56(b) provides that a defending party may move for summary judgment if the pleadings and supporting material "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment in favor of the defendant is therefore appropriate if plaintiff fails to: 1) produce evidence to support the existence of all essential elements on which plaintiff bears the burden of proof; and 2) show that all disputes about material facts or necessary inferences from the facts could reasonably be resolved in favor of either party by the trier of fact. *See, California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987); *Celotex Corp. v. Catrett*, __ U.S. __, 106 S. Ct. 2548, 3552-53 (1986); *Anderson v. Liberty Lobby, Inc.*, __ U.S. __, 106 S. Ct. 2505, 2511 (1986). *See generally*, Schwarzer, *Summary Judgment and Case Management*, 56 Antitrust Law Journal 213, 218 ("undisputed evidence submitted by a plaintiff may be insufficient to sustain a verdict which turns on a mixed question of law and fact under the applicable substantive law"). Defendants move for summary judgment on the grounds that the statute of limitations bars Counts one and two, and that Counts three and four are not cognizable under § 1983.

**Statute of Limitations**

*Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) holds that the statute of limitations in § 1983 actions is the same as that for personal injury claims in the state in which the trial court sits. The relevant California statute is California Code of Civil Procedure § 340(3); it establishes a one year statute of limitations for personal injury actions. Because the

incident occurred prior to *Wilson* the cause of action accrued one year after the Wilson decison [*sic*]: April 17, 1986. *Cabrales v. County of Los Angeles*, 644 F. Supp. 1352, 1354 (C.D. Cal. 1986). The conspiracy claim in Count two accrued at the same time. Plaintiff's first two claims are therefore untimely because he did not commence his action until May 1, 1987.

Plaintiff argues, however, that the statute is tolled pursuant to Cal. Gov. Code § 945.3. This provision prevents claims against peace officers from being filed while criminal charges are pending against the potential plaintiff. It also provides that the statute of limitations on the civil claims is tolled until the criminal charges are resolved. Although the tolling of the statute of limitations in a § 1983 action is usually governed by state law, *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), the tolling provisions of Cal. Gov. Code § 945.3 do not apply because they would defeat substantive policy considerations underlying § 1983. *Mangels v. City of Orange*, 678 F.Supp. 1452 (C.D. Cal. 1988).[1] Plaintiff's first two claims therefore are barred by the statute of limitations.

Claims for malicious prosecution do not accrue until the party is found not guilty or is exonerated. *Cline v. Brusett*, 661 F.2d 108 (9th Cir. 1981). Counts three and four thus did not accrue until May 2, 1986. These claims are therefore timely.

**Malicious Prosecution**

Claims based on malicious prosecution are generally not cognizable under § 1983 if process is available

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[1] Plaintiff at oral argument advanced several policy and doctrinal arguments for why the ruling in *Mangels* is mistaken. Even if these arguments were cogent, nothing in the record suggests that plaintiff's failure to advance his claims was caused by § 945.3.

within the state judicial system to provide a remedy; however, an exception exists when the prosecution is conducted with the intent to deprive a person of equal protection or is otherwise intended to effect a deprivation of constitutional rights. *Cline; Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985); *Usher v. City of Los Angeles*, 828 F.2d 556 (9th Cir. 1987). Plaintiff contends that his claim is cognizable because: 1) the criminal hearing was unfair; 2) the conduct of defendants was so "shocking" as to violate substantive due process; and 3) the intent of the prosecution was to deny plaintiff his First Amendment rights.

Current Ninth Circuit authority is not entirely clear as to when malicious prosecution claims based on a deprivation of due process are cognizable under § 1983. In both *Cline* and *Bretz* the plaintiff alleged that he was incarcerated because of a conspiracy that involved the bribery of witnesses, perjured testimony, and tampering with evidence. These allegations were sufficient to withstand a motion to dismiss. In contrast, in *Barker v. Johnson*, 799 F.2d 1396 (9th Cir. 1986), the court upheld summary judgment for defendants when plaintiff failed to allege either incarceration or that defendants had attempted to deny plaintiffs a fair trial. Plaintiffs did present evidence that baseless charges were brought against them for "political" reasons. The court held that this conduct did not "shock the conscience" and therefore did not violate substantive due process. *Id.* at 1400. It also held that there was no procedural due process violation in the absence of incarceration and tampering with evidence. The instant case presents an open situation in that plaintiff was not incarcerated, but he does allege that perjury and falsification of evidence occurred. Viewing the evidence in the light most favorable to plaintiff, and given that there is an allegation of tampering with the judicial process, the court cannot say

at this time that there was no violation of at least procedural due process.

Plaintiff must also allege a deprivation of a life, liberty, or property interest without due process of law to state a claim under the due process clause. *Id.* at 1399. Although plaintiff was not incarcerated, at oral argument his counsel stated that plaintiff had incurred legal fees in defending himself against the criminal charges and had also suffered mental anguish. The later loss does not appear to involve a liberty or a property interest, *Cf., Paul v. Davis*, 424 U.S. 693; 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (loss of reputation not a deprivation of a liberty or property interest); plaintiff cites no authority to the court which supports his view that it is. Attorney's fees might be cognizable under due process as a property loss, but in *Johnson* the court characterized the claims as alleging a deprivation of liberty and did not discuss any property loss. Nonetheless, *Johnson* did not explicitly hold that the payment of attorney's fees to defend against groundless charges is not a deprivation of property and defendants cite no authority for this proposition. The court notes, however, that if the attorney's fees are the basis of the deprivation then the damages in the case will not be high.

In *Usher v. City of Los Angeles*, 828 F.2d 556, 561-62 (9th Cir. 1986) the plaintiff alleged that defendants illegally arrested him, contrived charges to justify the arrest, submitted false police reports and initiated his criminal prosecution in bad faith; he also alleged that the police officers made racial slurs which demonstrated racial animus. The criminal proceeding against the plaintiff terminated in his favor. The § 1983 claim survived a motion to dismiss under the exception for a malicious prosecution intended to deny a person the equal protection of the laws.

Plaintiff here does not contend that the prosecution was intended to deny him equal protection, but does contend that his First Amendment rights were violated because the prosecution was in retaliation for his attempt, by telephone, to lodge complaints against defendants Galceran and Teal. Complaint ¶ 13. Numerous courts have held that access to the courts is protected by the petition clause of the First Amendment. *See, e.g., Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987); *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983); *Crews v. Petrosky*, 509 F. Supp. 1199 (W.D. Penn. 1981). There are two problems with plaintiff's argument. First in *Newton v. Rumery*, 480 U.S. __, 108 S.Ct. __, 94 L.Ed.2d (1987) the Supreme Court held that a release-dismissal agreement which dismissed criminal charges in exchange for a releasing the defendant's right to file an action under § 1983 was valid. *Newton* appears to overturn *MacDonald v. Musick*, 425 F.2d 373 (9th Cir. 1970) (stipulation that there was probable cause for arrest as condition to dismissal of drunk driving charge hampered plaintiff in asserting civil rights claim warranting habeas relief) and has uncertain implications for § 1983 actions based on a retaliatory prosecution. However, in *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987) the court held that *Newton v. Rumery* does not bar § 1983 claims based on retaliatory filings. *Haynesworth* differs from the instant case in that in *Haynesworth* a policy of retaliatory filings was alleged; here there is only the allegation of a single filing.

Second, even assuming that an allegation of a single retaliatory filing is cognizable under § 1983, plainiff does not raise a triable issue of fact over this claim. To successfully prove a malicious prosecution claim against

the police officers, plaintiff must overcome the presumption that the prosecuting official exercised independent judgment that probable cause existed. *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981). The presumption may be overcome, for example, by showing that the officers pressured the district attorney so that his or her decision is not independent. *Smiddy* (dicta); *cf. Johnson v. Barker*, 799 F.2d at 1400 (pressure from the sheriff on the prosecutor to prosecute the plaintiffs was not cognizable under § 1983). In any event, there is no competent evidence to raise a triable issue of fact in this case that the district attorney's office was pressured into prosecuting plaintiff.[2]

Plaintiff can also rebut the presumption by showing that the officers presented evidence to the prosecutor that they knew to be false. *Smiddy* at 267. According to plaintiff, the officers distorted the evidence in the case by destroying the original tapes, altering the new tape, and submitting perjured testimony. This allegation does not raise a triable issue of fact. The officers are immune from § 1983 suits based on perjured testimony. *Briscoe v. Lahue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); *Holt v. Castaneda*, 832 F.2d 123 (9th Cir. 1987). To allow a malicious prosecution claim based on allegedly perjured testimony would in effect allow § 1983 actions against the precise conduct — perjured testimony — that *Briscoe* renders immune. It is unclear, however, whether this immunity applies to complaints that police officers file. The closest analogy to these complaints is testimony at probable cause hearings. As the court notes in *Holt*, the existence of immunity in these hearings is an open question. *Holt*, 832 F.2d at 127.

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[2] Plaintiff's counsel's statements concerning the statements of the prosecutors he talked to are hearsay. Fed. R. Evid. 801 & 802. *See*, Richard Harding Decl. ¶ 26.

If this testimony does not give rise to liability, the only basis for the claim is the re-recording of the tape. Viewing the evidence in the light most favorable to plaintiff, the differences between the original tape and the tape available to the district attorney are minimal. According to plaintiff, approximately the first forty seconds (about two sentences) of the original tape were lost and his voice on the tape was distorted. Given that both parties are in general agreement as to the nature of the conversations, no trier of fact could reasonably find that these differences were the proximate cause of the district attorney's office decision to prosecute.

**Attorney Testimony**

Defendants argue that plaintiff's counsel should not be able to testify in the action and continue to represent plaintiff. *See, United States v. Clancy*, 276 F.2d 617, 636 (7th Cir. 1960), *rev'd on other grounds*, 365 U.S. 312 (1961). Plaintiff has not had an opportunity to repond in writing to this argument.

**Conclusion**

Plaintiff has until July 11, 1988 to brief the court on the following three issues:

1) Are the officers immune according to the rationale of *Briscoe* for statements made in the complaint?

2) What precisely is the competent evidence in the record that supports plaintiff's allegations of false evidence or testimony submitted to the district attorney that negate the presumption that the district attorney's decision to prosecute was independent?

3) Should the court prohibit plaintiff's counsel from testifying if he wishes to continue as counsel? If plaintiff must choose between striking counsel's testimony or obtaining new counsel, which would he prefer?

Defendants have until July 20, 1988 to reply.

DATED: June 28, 1988

/s/ Pamela Ann Rymer
Pamela Ann Rymer
United States District Judge

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

FILED
SEP 2 1988
Clerk, U.S. District Court
Central District of California
By /s/ SR Deputy

ENTERED
Clerk, U.S. District Court
SEP 6 1988
Central District of California
By Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

EDWARD JOSEPH HARDING,
Plaintiff,
v.
DAVID GALCERAN, et al.,
Defendants.

No. CV 87-2782 PAR
MEMORANDUM OF DECISION AND ORDER

Plaintiff's complaint contains four counts alleging violation of his civil rights; jurisdiction is pursuant to § 1983. On June 30, 1988 the court granted summary judgment on two of the claims because they were barred by the relevant statute of limitations and requested further briefing on three issues[1] that arose from the last

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[1] (1) Are the officers immune according to the rationale of *Briscoe* for statements made in the complaint? (2) What precisely is
(continued)

two counts. Counts three and four allege that the defendants maliciously prosecuted plaintiff and conspired to maliciously prosecute him. The parties have submitted papers on two of the three issues; the court now grants defendants' motion on the last two claims.

The second question posed to the parties stated:

> 2) What precisely is the competent evidence in the record that supports plaintiff's allegations of false evidence or testimony submitted to the district attorney that negate the presumption that the district attorney's decision to prosecute was independent?

Plaintiff does not address this issue explicitly, but does reiterate his belief that law enforcement officers generally push for the filing of baseless criminal charges against potential plaintiffs. This assertion is neither supported in the record, nor does it prove that the defendants so acted in this case.[2] Defendants counter that there is no competent evidence supporting plaintiff's malicious prosecution claims except for the testimony of two of the defendants at the trial — an activity for which they are immune from suit. None of the defendant

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(ftn. continued)
the competent evidence in the record that supports plaintiff's allegations of false evidence or testimony submitted to the district attorney that negate the presumption that the district attorney's decision to prosecute was independent? (3) Should the court prohibit plaintiff's counsel from testifying if he wishes to continue as counsel? If plaintiff must choose between striking counsel's testimony or obtaining new counsel, which would he prefer?

[2] To the extent that plaintiff's assertion is true, the rule adopted by this court in *Mangels v. City of Orange*, 678 F.Supp. 1452 (C.D. Cal. 1988) should have a salutory effect by preserving the availability of a federal forum for the vindication of accused citizen's civil rights.

officers signed the complaint. Motion Exhibit B. Under these circumstances, plaintiff has failed to carry his burden under *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986); *Matsushita v. Zenith Radio*, 475 U.S. 574, 89 L.Ed.2d 538, 106 S.Ct. 1548 (1986), that the decision of the prosecutor was not independent. Given this determination, the court does not reach any other outstanding issues.

DATED: August 31, 1988

/s/ Pamela Ann Rymer
Pamela Ann Rymer
United States District Judge

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**CIVIL MINUTES — GENERAL**

Case No. CV87-2782-PAR Date October 16, 1987
Title Edward Joseph Harding v. David Galceran, et al.

DOCKET ENTRY

PRESENT:
HON. Pamela Ann Rymer , JUDGE

Deputy Clerk Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
Richard C. Harding
(818) 304-0320

ATTORNEYS PRESENT FOR DEFENDANTS:
Gordon W. Trask
974-1948

PROCEEDINGS: STATUS CONFERENCE. Court and counsel having conferred and counsel having agreed that the following schedule is reasonable in light of the issues in dispute in the case, IT IS ORDERED:

(___) Court Order to be prepared by counsel.

(___) Further status conference set for _____
a.m. by telephone
at ___ p.m. in Chambers

(___) Unserved parties to be dismissed by _____.

(X) Discovery cut-off set for 3/31/88 .

(___) Law and motion cut-off set for _____.

(___) Settlement conference set before Judge Rymer on
a.m.
_____ at ___ p.m.

(X) Pre-trial conference set for 5/9/88 at 3:00 p.m.

Jury (√) Court (___) trial set for 5/24/88 at 9:00 a.m.

(Estimated trial length _____ days).

Counsel for Π agrees that all claims are §1983 claims, and that no claims are either pendent state law claims or §1985 claims.

/s/ PAR

cc: All counsel

Initials of Deputy Clerk ____

MINUTES FORM 11
CIVIL — GEN D — M

# APPENDIX C

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**FILED**
FEB 14 1990
Cathy A. Catterson, Clerk
U.S. Court Of Appeals

EDWARD JOSEPH HARDING,
Plaintiff-Appellant,
v.
DAVID GALCERAN; TERRY GINGERICH; LAWRENCE MOSER; JAMES D. CHISIM, [*sic*] et al.,
Defendants-Appellees.

No. 88-6484
D.C. No. CV-87-2782-PAR

ORDER
Appeal from the United States District Court
for the Central District of California

Before: HUG, FARRIS, and REINHARDT,
Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on it. Fed R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

# APPENDIX D

## THE CIVIL RIGHTS ACT OF 1871, 42 U.S.C. SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## THE CIVIL RIGHTS ACT OF 1866, 42 U.S.C. SECTION 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

# APPENDIX E

## CALIFORNIA TORT CLAIMS ACT OF 1963, CALIFORNIA GOVERNMENT CODE SECTION 945.3

No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing a peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, including an act or omission in investigating or reporting the offense or arresting or detaining the accused, while the charges against the accused are pending before a justice, municipal, or superior court.

Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending before a justice, municipal, or superior court.

For the purposes of this section, charges pending before a justice, municipal, or superior court do not include appeals or criminal proceedings diverted pursuant to Chapter 2.5 (commencing with Section 1000), Chapter 2.6 (commencing with Section 1000.6), Chapter 2.7 (commencing with Section 1001), Chapter 2.8 (commencing with Section 1001.20), or Chapter 2.9 (commencing with Section 1001.50) of Title 6 of Part 2 of the Penal Code.

Nothing in this section shall prohibit the filing of a claim with the board of a public entity, and this section shall not extend the time within which a claim is required to be presented pursuant to Section 911.2.

# APPENDIX F

## CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 340

Within one year:

(1) An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

(2) An action upon a statute for a forfeiture or penalty to the people of this state.

(3) An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Section 4826 of the Business and Professions Code, for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl.

(4) An action against an officer to recover damages for the seizure of any property for a statutory forfeiture to the state, or for the detention of, or injury to property so seized, or for damages done to any person in making any such seizure.

(5) An action by a good faith improver for relief under Chapter 10 (commencing with Section 871.1) of Title 10 of Part 2 of the Code of Civil Procedure. The time begins to run from the date upon which the good faith improver discovers that the good faith improver is not the owner of the land upon which the improvements have been made.

(2)

No. 89-1772

Supreme Court, U.S.
FILED
JAN 22 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

DAVID GALCERAN and ED TEEL

*Petitioners,*

*vs.*

EDWARD JOSEPH HARDING,

*Respondent.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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*Attorney for Respondent*
EDWARD JOSEPH HARDING

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# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## I.

## STATEMENT OF THE CASE

This case involves a dispute between Edward Joseph Harding (Respondent) and Sheriff's deputies David Galceran and Ed Teel (collectively, "Petitioners") of the San Dimas Sheriff's Substation, Los Angeles, California. The district court found that Respondent's first and second claims against Petitioners were barred by the statute of limitations and granted Petitioners' summary judgment. The Ninth Circuit Court of Appeals found that the statute of limitations was tolled and reversed.

On October 10, 1984, Respondent, a local businessman, went to the San Dimas Sheriffs substation ("Sheriff

substation") to help bail out a business associate who had been arrested. Respondent spoke to Petitioner Galceran ("Galceran") and became convinced that Galceran was not being as courteous and cooperative as a reasonable civil servant should have been. After several futile attempts by Respondent to clarify the situation of the arrestee, a dispute occurred.[1] The Petitioners told Respondent to leave as they proceeded to use excessive force in effecting his departure. Petitioners did not then and there arrest Respondent for what they considered to be a mere verbal disagreement. However, they freely

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[1]The dispute terminated in Respondent stating to Petitioner Galceran, "You know, officer, your attitude reminds me of one of those moronic small town sheriffs that you see on T.V." (Appendix B, p. B-2 of Petition for Writ of Certiorari.)

vented their passions in proprietary actions taken to threaten, harass, intimidate and eject Appellant from the substation and adjacent public premises. After he left, Respondent called the Sheriff's substation to lodge a complaint about the Petitioners' actions. In a remedial attempt to justify their earlier misconduct and a transparent tactic to nullify Respondent's effort and noticed intent to bring a complaint against them, the following day Galceran filed a four count misdemeanor complaint against Respondent charging him with disturbing the peace, obstructing a peace officer in the performance of his duties, challenging a person in a public place to fight, and making threatening phone calls. The complaint was totally

meritless and lacking in probable cause.[2]

---

[2]Two of the alleged offenses, Counts I and II, respectively California Penal Code Sections 415.3 and 148, falsely and fraudulently alleged assaultive conduct by Respondent while he was at the Sheriff substation. Counts III and IV, respectively California Penal Code Sections 415.1 and 653m(a), falsely and fraudulently alleged telephone offenses arising entirely out of Respondent's telephoning the substation to lodge complaints against Petitioners. Counts III and IV failed, on the face of the facts set forth in Galceran's complaint report, to state any crime whatsoever against Respondent. Count IV, moreover, was dismissed at trial pursuant to a "Hitch" motion arising from the wilful and intentional destruction of the original tape-recorded conversations. The original police tape was destroyed, after the trial court had ordered its preservation, as a result of a conspiracy among Petitioners and others to destroy and conceal evidence that would have potentially exculpated Respondent (on said Counts I through IV) and established Petitioners' unlawful conduct at the Sheriff's substation. Due to obstructionist and delaying prosecutorial tactics, the criminal case took approximately nineteen months to come to trial. On May 2, 1986, after a full exploration of the facts of the incident took place in a week long criminal proceeding, a jury acquitted Respondent on the remaining three counts. Petitioners perjured themselves by

The Respondent commenced a § 1983 damage action against Petitioners, and others, on May 1, 1987, within one year of his acquittal on the criminal complaint. Respondent's complaint contained four causes of action and related both to the official misconduct which took place at the San Dimas Sheriff's substation on October 10, 1984, and to the malicious and abusive use of the criminal process which followed the incident and culminated in Respondent's acquittal after nearly nineteen months of delay. The acquittal was the sin qua non of accrual of Respondent's third and fourth causes of action for malicious prosecution which, while dismissed

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testifying to multiple and contradictory versions of the incident at trial.

pursuant to summary judgment, was and remains an integral part of Respondent's § 1983 lawsuit. The Respondent's 1983 complaint alleged that both the use of excessive force at the substation (Causes I and II), as well as the subsequent abuse of process or malicious prosecution (Causes III and IV), were perpetrated by Petitioners for the purpose of preventing Respondent/plaintiff from exercising first amendment rights in a legitimate dispute with and complaint against them.[3]

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[3]Respondent takes exception to the mischaracterization and misstatement of the facts in the Petition for Writ of Certiorari to the extent that they differ from the foregoing account which is substantiated by the reporter's transcript of the criminal proceedings and the acquittal/dismissal of all criminal charges, as well as in the District Court's Memorandums of Decision and Order and the Ninth Circuit's Opinion.

## II.

## SUMMARY OF ARGUMENT

Respondent asserts that the application of the prohibition/tolling provisions of California Government Code Section 945.3 (hereafter "Section 945.3") to the case at bar is intended and legally correct, appropriate as a functionally and logically related prohibition/tolling scheme coordinate with California Code of Civil Procedure Section 340 (hereafter "C.C.P. § 340), and that the application of this California scheme is not inconsistent with the articulated and paramount federal policies implemented by the Supremacy Clause of the United States Constitution, Article VI (hereafter "Supremacy Clause").

The Petitioners assert that Section 945.3 is not an intended "coordinate"

tolling scheme as indicated by the spatial and contextual arrangement of said provisions within the California Tort Claims Act (hereafter "CTCA"). However, if said prohibition/tolling scheme is applicable to the case at bar as a "coordinate" tolling scheme, then under the Supremacy Clause it must yield in its entirety to the specific federal policies underlying the Civil Rights Act of 1871, § 1983 (hereafter "§ 1983 action").

The District Court, adopted the argument of Mangels v. City of Orange, 678 F.Supp. 1452 (C.D. Cal. 1988), and found that "Although the tolling of the statute of limitations in a § 1983 action is usually governed by state law, Board of Regents v. Tomanio, 446 U.S. 478 (1980), the tolling provisions of California Government Code Section 945.3

do not apply because they would defeat substantive policy considerations underlying § 1983." (Memorandum of Decision and Order, Appendix B, p. B-5, Petition for Writ of Certiorari.) Thus, while apparently finding Section 945.3 to be a "coordinate" prohibition/tolling scheme, the District Court impliedly found that, under the Supremacy Clause, the prohibition provisions had to yield as being inconsistent with the federal policies underlying the § 1983 action. As the result of this preemption, the District Court, agreeing with Mangels, at p. 1455, impliedly found that the purposive tolling provisions of Section 945.3 could not be prevailed upon without having been subject to Section 945.3's disabilities.

The Ninth Circuit Court of Appeals found Section 945.3 to be a "coordinate"

tolling rule of C.C.P. 340. Although it found that the prohibition provisions in paragraph one of Section 945.3 must fall under the Supremacy Clause, it found that the tolling provisions of Section 945.3 are consistent with and, in fact, serve the objectives behind § 1983 actions and, therefore, do not fall under the Supremacy Clause.

Amicus Curiae City of Vallejo (hereafter "amicus") in support of the Petitioners, apparently confused the concept of a statute being unconstitutional with the concept of being preempted under the Supremacy Clause. It contended that a rule of severability makes partial invalidation of a statute improper where it would be contrary to legislative intent. Amicus asserted that Section 945.3 "must fall in its entirety because the California

Legislature would not have enacted the valid part had it known that the rest would fail to pass Constitutional muster." (Brief of Amicus, p. 3.)

## III.

## ARGUMENT

### A. Section 945.3 Prohibition/Tolling Rule Under Considerations of Younger v. Harris.

Consideration of Younger v. Harris, 401 U.S. 37 (1971), and its progeny, mandate the application of some form of tolling rule vis-a-vis § 1983 actions while related state criminal prosecutions are pending. The Respondent in the case at bar, like the plaintiff in Younger, claimed that the state prosecution itself inhibited his exercise of First Amendment Rights. Respondent relied on the

application of Government Code Section 945.3, through Tomanio borrowing rules, and did not file his § 1983 complaint while the state criminal prosecution was pending. However, it is clear that had Respondent acted upon Petitioners' hypothesis that Section 945.3 is inapplicable to § 1983 actions, and proceeded to file, that said § 1983 action (which may have sought equitable relief in addition to damages at that point in time) would have been dismissed pursuant to the Younger doctrine had equity been sought.[4]

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[4]The Court, in Younger, gave several related justifications for its decision. Among them that equity should not restrain a criminal prosecution when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution are not in themselves 'irreparable.' Such a rule prevent[s] erosion of the role of the

However, it is further arguable that this court would apply Younger to § 1983 damage actions such as in the case at

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jury and avoid[s] a duplication of legal proceedings and legal sanctions." Younger, at p. 44. Moreover, the concept of comity, a "proper respect for state functions," is intimately related to the nature of federalism:

> " . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." Younger, at p. 44.

Under Younger, federal Section 1983 equitable relief would not be available where the federal plaintiff has already engaged in conduct which is possibly criminal but is arguably constitutionally protected, and asserts he or she wishes to engage in such conduct in the future. The Younger rule differs from abstention in mandating outright dismissal of the federal claim in deference to the state criminal proceedings.

bar. On grounds of mootness, this court declined to consider whether a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state court attacks on the conviction itself. Tower v. Glover, 467 U.S. 914 (1984). This court left open the applicability of Younger to § 1983 damage complaints in Juidice v. Vail, 430 U.S. 327 (1977). The Eighth Circuit applied Younger to bar a § 1983 damages action against police officers while criminal litigation was pending. McCurry v. Alle, 606 F.2d 795 (8th Cir. 1979), rev'd on other grounds, 449 U.S. 90 (1980). In Deakins v. Monaghan, 484 U.S. 1983 (1988), this Court declined to consider "the extent to which the Younger doctrine applies to a federal action seeking only

monetary relief." Deakins, at 202, (emphasis added). While the majority and the concurring opinions appeared to agree that Younger has some applicability to federal damages actions whose resolution could affect pending state proceedings,[5] the majority stated that the District Court had no discretion to dismiss, but only to stay, damages claims that could not be redressed in the state proceedings. The concurring opinion took the position that Younger required the District Court to stay the damages claims as a matter of policy. While it may be true that the applicability of Younger to damages actions is arguably an open

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[5]In the case at bar, the effects of the criminal proceeding upon substantive issues such as probable cause, res judicata, collateral estoppel -- not to mention the procedural and practical ramifications -- are substantial.

question in this Court, the rule in the Ninth Circuit under Mann v. Jett, 781 F.2d 1448 (9th Cir. 1986) (per curiam), at the time of filing this § 1983 action, was that Younger did apply to damages actions. However, more recently, the Ninth Circuit has determined that the District Court erred in dismissing a damage action on the basis of Younger where the 1983 plaintiffs could not adequately litigate their damage claims in the state court proceeding. Lebbos v. Judges of the Superior Court of Santa Clara County, 883 F.2d 810 (9th Cir. 1989).

On the assumption that Younger would apply to a § 1983 damage action while a state criminal prosecution is pending, if only to stay rather than dismiss the action, the net result is the defeat of the same policies underlying § 1983

actions that Petitioners, Amicus, the Mangels decision, the District Court and the Ninth Circuit decision in the case at bar claim are defeated by the prohibition rule set forth in Section 945.3. It would make little sense to determine that Section 945.3 does not apply to § 1983 damage actions under the Supremacy Clause, because of inconsistency with the paramount policy of open and immediate access to the federal courts to vindicate constitutional rights, when the federal forum would then just invoke the Younger abstention doctrine to stay the § 1983 action pending the outcome of the state criminal proceeding.

There is a fundamental conflict and counter-balance between the policies underlying the § 1983 action and the policies underlying the Younger doctrine. While in one direction we want

individuals to be able to vindicate important Constitutional rights against their erosion by unconstitutional state action; in the other we also want states, under our federal system of government, to have a degree of autonomy in the exercise of legitimate state judicial processes. Petitioners' professed concern for the policies protecting the immediate vindication of constitutional rights notwithstanding, they would have been quick to attack those policies by seeking Younger abstention if Respondent, in the case at bar, had filed his § 1983 during the pendency of the state criminal prosecution. Precaution, if not sensible and healthy suspicion, would lead a reasonable person to deduce that Petitioners are more concerned with an outcome-determinative manipulation of policies and theories to restrict or

limit state liability than they are with a consistent and harmonious interweaving of significant, but sometimes opposing, federal policies. Such a laissez-faire approach to legal philosophy, and its competing objectives, taken far enough ultimately results in chaotic and irrational governance.

Assuming, arguendo, that Section 945.3 prohibition does not apply during the pendency of a state criminal proceeding, in the federal forum there would be a requirement of (1) filing within the C.C.P. 340 one year period, (2) notice pleading and (3) Younger abstention. This really does not differ, except as to time periods, from the CTCA scheme combining claim presentation, litigation prohibition and tolling. If the state claim presentation requirement is non-applicable to § 1983 actions, it

makes little sense to import an analogous federal requirement into the § 1983 action. If by the extension of Younger to § 1983 damage actions, there first occurs a requirement that notice be given by filing the action and, secondly, there occurs a mandate that the litigation be stayed or prohibited during the pendency of the criminal prosecution, we have unwittingly adopted a de facto analogous federal claim presentation requirement that was abandoned at the state level. A system of filing, staying and retaining jurisdiction is tantamount to a system of claims presentation, litigation prohibition and tolling -- just different words. Yet the net affect of the mechanical and technical application of a Younger type abstention rule is to reintroduce a claim requirement at the

federal level that has long been jettisoned at the state level.

The Younger scheme (of filing, staying and retaining jurisdiction of the § 1983 action), importing as it does the extra baggage of filing a claim becomes unnecessary if a coordinate, that is, functional, state tolling rule is adopted that simultaneously prohibits and tolls the § 1983 action during the pendency of the state criminal proceeding.

It is the tolling aspect of Section 945.3 and the analogous retention of jurisdiction element of the Younger abstention scheme that are the common grounds or elements that can be identified in the two systems. It is precisely the commonality between the tolling/retention of jurisdiction elements that becomes the nexus, bridge, connection or key that harmonizes the two

competing objectives of decentralization or discrete federalism in government and national protection of constitutional rights.

Aside from the extra baggage of a new federal notice requirement that would attach to a mechanical application of Younger, within a framework of a one year statute of limitation, the preclusion effect of the staying of an already filed action under Younger and the prohibition effect of Section 945.3 both operate along the same vector to further the discrete policies of decentralization or federalism and, in the contra-positive, both operate to undermine the policies of broad and immediate access to a forum for the vindication of constitutional rights underlying § 1983. Therefore, it cannot be a violation of the Supremacy Clause to adopt a state rule of prohibition if one

is simultaneously going to posit a federal rule of staying. In terms of ultimate application of the Supremacy Clause, one must determine which federal policy is to be given supremacy, namely, federalism or the immediate vindication of national constitutional rights. If the policies underlying federalism are to be paramount, then the prohibition/staying element of such scheme cannot be in conflict with or inconsistent with the ultimate federal policy of federalism under the Supremacy Clause and the arguments of the Ninth Circuit's decision, as well as those of Mangels and Petitioners, would be erroneous to that extent. If, on the other hand, the policies underlying the § 1983 cause of action of vindication of national constitutional rights of individuals is to be the paramount

federal policy under the Supremacy Clause, then both the Section 945.3 prohibition and the Younger preclusion effect of staying would both have to fall by the wayside in relationship to the § 1983 action.

A decision tree-type analysis is of help in approaching a solution to the overall puzzle. First, the paramount federal policy must be identified -- federalism or vindication of national constitutional rights. Secondly, if § 1983 vindication is selected, then both Section 945.3 prohibition and Younger abstention fall by the wayside under the Supremacy Clause. If, on the other hand, federalism is selected as the paramount federal policy, then whether the Wilson/Tomanio scheme of borrowing of the state personal injury statute of limitations and coordinate, i.e.

functionally related, tolling exceptions applies in the first instance (where a state such as California has adopted a state prohibition/tolling statute) or the Younger scheme (of filing within a state personal injury statute of limitations sans prohibition/tolling exception, and, then, staying/retaining jurisdiction) clicks-in in the second instance -- makes little difference. A state ought to have the right to either adopt or not adopt a prohibition/tolling rule in the first instance under the philosophy of the supremacy of a policy of federalism. If, unlike California, the state does not adopt a prohibition/tolling rule, in the first instance, then, and only then, would the application of the Younger abstention (staying and retention of jurisdiction) doctrine click in to effect the same result of imposing a philosophy

predicated on the supremacy of federalism. The net result of not supplanting the state prohibition/tolling rule with the Younger abstention rule in the first instance, would be to avoid inconsistency in the application of federal policy and to allow the § 1983 action to further its own exclusive policies within the constraints and bounds of federalism by not being forced to adopt in the first instance a de facto federal claim presentation rule as the direct result of substitution of Younger abstention in the context of the notice pleading requirements of the Federal Rules of Civil Procedure.

Respondent submits that considerations of federalism ought to be the paramount federal policy operative under the Supremacy Clause when juxtaposed with the very important goals

of the vindication of national, constitutional rights. The supremacy of policies of federalism establishes the necessary order within which the national vindication of individual, constitutional rights can occur. Without the primacy of order, the vindication of individual, constitutional rights would quickly destroy themselves by destroying the very fabric of minimal order necessary to sustain those individual, constitutional rights. Applying this analysis to the case at bar, Respondent submits that the Ninth Circuit's decision in Harding should be affirmed in part as to tolling and reversed in part as to the finding that California's Section 945.3 prohibition rule must fall under the Supremacy Clause.

B. **Section 945.3 Is A Coordinate Tolling Provision Of C.C.P. 340.**

Petitioners and amicus attempt to sell us the proposition that Section 945.3 is not a "coordinate" tolling provision of C.C.P. 340. In doing so they, in fact, have urged the adoption of a new tolling rule. They have grasped onto a word, "coordinate," that was first used in Board of Regents v. Tomanio, 446 U.S. 478 (1980), in passing. By over-emphasizing it and suddenly defining it they emerge with a new tolling rule heretofore totally unprecedented. It results not merely from an interpretation of the Tomanio decision in a new context. The rule urged by Petitioners gives a new and more policy-restricted interpretation to the Tomanio decision. It creates a new concept of "coordinate tolling rules" not implicit in Tomanio and its progeny.

In Tomanio, the one-time, almost incidental use of the phrase "coordinate tolling rules" in dicta was not defined. The navigational, astronomical or mathematical imagery connoted by this phrase does not appear to convey any more than an unspecified general, meaning of relatedness, connection, or application. Or, the Court may have meant no more than a concept of equality between the statutes of limitation and their exceptions in the adjectival use of the word "coordinate." There were no criteria or standards set forth therein for determining exactly what these rules ought to be. The discussion in Tomanio of the fact that the State of New York had codified in one place all the tolling rules along with the statutes of limitation, implied that in other jurisdictions that might not readily be

the case. The discussion of the codification of the New York tolling rule pointed up a convenience in arrangement of New York statutory law, not a rigid formulation, test or necessity. An examination of tolling rules will show that they are not rigidly determined by a formula that selects them according to how they are arranged in time and space. Precedent shows that tolling rules are related to statutes of limitations along logical, practical and functional lines, as opposed to spatial and temporal proximity.

A test of "coordinate" tolling rules is an ordering principal, that universally, and not just in New York or California, relates, connects, matches and applies tolling rules to statutes of limitation. Such a universal ordering principal by definition cannot be the

location or arrangement of the tolling provisions within a codified system of statutory law.

Tomanio found that, under the reasoning of the Supreme Court's decisions in Robertson v. Wegmann, 436 U.S. 584 (1978); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); and Monroe v. Pope, 365 U.S. 167 (1961), federal courts were obligated not only to apply the analogous state (New York) statute of limitations to Respondent's federal constitutional claims, but also to apply the state's (New York's ) rule for tolling that statute of limitations.

The immediate response to the problem of determining which among several alternative state tolling rules to apply might be to look at the state's legislative intent in enacting the

particular tolling provisions. Which were intended to apply? However, often such intent is not made explicit and can't be inferred from the statutory language itself. The language of Section 945.3 is broad and all-encompassing. It counsels that the intent of the legislature was that Section 945.3 would be a "coordinate" tolling rule for "any applicable statute of limitations for filing and prosecuting these actions . . . " The phrases "these actions" incorporates a portion of another paragraph, the prohibition provisions, where it is defined as " . . . a civil action for money or damages against a peace officer . . . based upon conduct of the peace officer relating to the offense for which the accused is charged . . . " (Appendix E, p. E-1, Petition for Writ of Certiorari.) Section 945.3 is further

divided into separate paragraphs, each with its own purpose. Each separate paragraph of Section 945.3 could stand alone in its purpose and meaning except for the first paragraph embodying the "prohibition" provisions, which on its face would not pass constitutional muster without the corollary tolling provisions.

However, it is often not enough to look to the statute itself to infer the legislative intent on a particular point. One must further look to the practical purpose to be served by the statute and its logical and functional relationship to the underlying state policies sought to be implemented. It would be of only slight significance to determine the

spatial and chronological arrangements of the tolling provisions within the code.[6]

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[6] As stated in Johnson, at 463-464 and quoted in Tomanio, at 485-486:

"Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim." (Emphasis added.)

A fundamental legal issue that emerges from the case at bar is whether the state intended that a specific tolling provision might apply to a specific statute of limitation. Petitioner, here, alleges that the State of California did not intend Government Code Section 945.3 to apply to C.C.P. Section 340(3). That this is not only

C. **California Law Is Clear That Provisions Of The CTCA Apply To § 1983 Actions If They Are Not Inconsistent With Or Discriminatory Against Federal Law and Policy.**

The basic import of Williams v. Horvath, 16 C.3d 834; 129 Cal.Rptr. 453, 548 P.2d 1125 (1976) is that the provisions of the CTCA are applicable to

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not necessarily true, but also lacks persuasive probability, is demonstrated in the express, absolute, language of Government Code Section 945.3, itself.

The clear language of this statute makes it functionally applicable and coordinate with C.C.P. Section 340(3) whether the legislature intended this result or not. It should, therefore, be presumed that the legislature intended that it should apply. At least it is clear that it cannot be fairly stated that the legislature intended that it not apply to C.C.P. Section 340(3). Although it cannot be stated with certainty that the legislature intended that it apply, it can be said with some persuasive force that the legislature did not intend that it not apply.

a § 1983 action, but that certain provisions of the act are preempted by the federal legislation. Williams confirms that California courts, themselves, believe that CTCA applies to § 1983 actions where not preempted under the supremacy clause by the federal constitution, statutes, policies or U.S. Supreme Court case law interpreting same.

Any limitations Williams placed on the application of the CTCA to 1983 actions arises from any conflict the former state act may present to the implementation of federal policies. " . . . While it may be constitutionally permissible for the Legislature to place this substantive impediment in the path of a state cause of action, it is clear that the supremacy clause will not permit a like abrogation of the perquisites of a federal civil rights litigant."

Williams, p. 842. Williams held the claim provision of the CTCA to be inoperative in an action brought under § 1983.

Moreover, Williams then explicitly goes on to state "There are, however, certain sections of the Tort Claims Act which would not inhibit the attainment of the objectives of the Civil Rights Act . . . " In this respect, the case at bar is similar to Williams. Section 945.3, like Section 825 of the CTCA (indemnification), contains nothing in its language to suggest that a civil action against a police officer is to be prohibited and tolled "only if the cause of action upon which liability was predicated had its source in the Tort Claims Act. On the contrary, the specific reference in Section 825 [substitute 945.3] to any

claim or action negates this inference." Williams, p. 843.

Again in sync with Williams, "nor, as an analysis of the leading federal cases shows, is there anything in § 1983 which precludes a state from indemnifying public employees [substitute tolling the statute of limitations] when liability is founded upon that section." Williams, p. 843.

The Williams case also provides a concrete example of how the CTCA and the Civil Rights Act may positively interface with one another where the net affect is to enhance the federal policies involved.[7]

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[7]"Secondly and most importantly, entirely different considerations prevail in determining application of the claim requirement and the indemnification provisions of the Tort Claims Act. With regard to the claim section, the question is the extent to which state procedural obstacles may be invoked to obstruct the

D. **The Petitioners And Amicus, Representing The Interest Of State and Local Government, Seek A Discriminatory, Outcome-Determinative Result In The Case At Bar.**

In the case at bar, Petitioners and Amicus would like to see Section 945.3 rendered totally inapplicable to § 1983 actions. Application of the Supremacy Clause to either partially or entirely preempt Section 945.3 as applied to § 1983 actions, would leave Section 945.3 totally intact with respect to analogous state law causes of action. While

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rights of plaintiffs relying on federal law. On the issue of indemnification, however, there can be no charge that these provisions obstruct invocation of the federal right; on the contrary, they enhance that right by ensuring that the individual employee is able to meet his responsibilities." Williams, p. 847.

Petitioners and Amicus desire to maintain their policy edge in state law remedial actions, they apparently believe that there is no way around the partial preemption of the prohibition provisions of Section 945.3 as the result of the implementation of the policies underlying § 1983 actions through operation of the Supremacy Clause. However, as between partial preemption and total preemption, the Petitioners and Amicus much prefer total preemption as the lesser of two evils. Partial preemption confers an option beneficial to the claimant seeking remedial action. Whereas total preemption forces the claimant into a practically untenable situation of having to psychologically and monetarily pursue two fronts of the war simultaneously. In most cases this would practically force an election to abandon the civil remedy

in favor of mounting a criminal defense. However, under total preemption, claimants' § 1983 action would most likely be stayed pending the outcome of the criminal proceeding under policies analogous to or extending Younger v. Harris thereby indirectly giving the state and local government the benefits of prohibition while, simultaneously, forcing the additional burden of filing on the claimant within the primary period of limitations. This, of course, would be tantamount to the importation of a notice requirement into the § 1983 action.

Thus, it is clear that Petitioners and Amicus desire a result that discriminates, and Respondent believes unfairly so, between the § 1983 causes of action and the state analogs to those causes of action. Another way for

Petitioners and Amicus to reach this same discriminatory result is manipulation of state tolling legislation by application of their concept of "coordinate" tolling rules. This can now be effected, in part, because of the states' fore-knowledge of the § 1983 commitment to the general personal injury statutes of limitation under applicable borrowing rules, and their ability to adjust other "non-coordinate" tolling rules accordingly.

A state tolling rule which tolls the limitations period for those who are imprisoned but not for "federal civil rights cases" may not be applied to § 1983 claims, because it discriminates against § 1983 claimants. The fact that a state need not provide for tolling during imprisonment "does not mean that a state may provide tolling for state

claims but refuse to do so for analogous federal claims and have this discrimination incorporated as federal law." Hughes v. Sheriff, 814 F.2d 532, 535 (8th Cir.), appeal dismissed and cert. denied, 108 S.Ct. 46 (1987). The court applied a state tolling rule free of the discriminatory provision. See, also, Campbell v. Haverhill, 155 U.S. 610, 615 (1895).

Petitioners want us to believe that federal law would permit a double standard for civil actions against police officers that discriminates against the federal § 1983 action. Under Petitioners' suppositions, if an action was filed as a § 1983 action, whether in a federal or state forum, there would be no tolling of the limitations period while a potential plaintiff was being criminally prosecuted. However, if an

action is filed as a CTCA action, it would be dismissed (prohibited) and the period of limitations would be tolled as long as any criminal action was pending. This is a clear discrimination between the state cause of action and the federal cause of action. Moreover, this double standard subverts the very state policies for which the state prohibitory and tolling statute was enacted. Ultimately, the federal policies underlying § 1983 would also be subverted either by the claimants' practical need to abandon the § 1983 action to defend a criminal action or by the application of the Younger doctrine.

"Coordinate" tolling provisions should not be a buzz word for separate and discriminatory tolling provisions: one treatment for state causes of actions against police officers, and a completely

opposite treatment for federal causes of action against police officers. It well serves the state to prohibit and toll state actions against officers while criminal proceedings are pending against the potential plaintiff. Civil actions that otherwise could become "bargaining chips" and discovery devices are postponed until after the criminal proceeding. If the criminal proceeding results in a conviction of the potential plaintiff, it becomes improbable that any civil action would be filed and scarce judicial resources are then preserved. A drawback of any prohibition scheme is that it presents an opportunity to law enforcement to engage in an abuse of process or a malicious prosecution. Where a victim of wrongful police activity makes or threatens to make a complaint against such authorities,

spurious criminal charges could be filed against the potential plaintiff in retaliation and/or in an attempt to derail his complaint against wrongful police activity.[8]

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[8]The commencement of criminal proceedings without probable cause would create a number of obstacles to a plaintiff seeking compensation for a wrongful police action. He would have to suffer the inconvenience, embarrassment and expenses of standing trial. This is no little concern. He would also be subject to criminal penalties that would have some strong probability of realization particularly where perjury, politics and admissibility of evidence intermix. Even if the peoples' case appeared to be fatally weak, there would be a strong probability of plea bargaining which would result in some kind of conviction or an admission of probable cause. Another obstacle to the civil action is the delay of time that the prohibitory provision would cause. Time delay has the natural effect of taking the sting out of events, causing a reshuffling of priorities and interposing multiple practical problems of proof, convenience, memory, resources, etc. However, assuming a potential plaintiff in a police misconduct case has the patience of Job, the resolve of principle, the resources and the nerve to risk conviction (with all of its manifest

While it serves the state's interest to prohibit and toll state causes of action against police officers while a criminal proceeding is pending, it seems that it best serves state interests if the federal cause of action can be forced to be prosecuted, if at all, simultaneously with the plaintiff having to defend a criminal prosecution. This anomaly arises from the fact that the Supremacy Clause and federal policy has prohibited a state from prohibiting prosecution of a civil rights claim while a state criminal prosecution is pending. If such invocation of the Supremacy

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negative impact on family, career, business and lifestyle), as well as the bucks to successfully navigate through to an acquittal of criminal charges, he might wind up with an enhanced complaint against state authorities which could possibly include malicious prosecution and/or abuse of process.

Clause is justified, it would best serve state interest to make the prosecution of the civil rights claim as difficult as possible by forcing the duplicative and simultaneous expenditure of resources. It would not serve state interest to merely toll the time within which the federal claim could be filed thereby giving the potential plaintiff the option of proceeding with his action at a time that allows the focus and concentration of time, effort, and resources.

A pivotal difference that distinguishes the case at bar from those cases applying state tolling provisions for prisoners that are incarcerated is that, while such tolling provisions are clearly enacted by the state for the benefit of the prisoner, the tolling of a case during a prohibitory period created by the state (the period while a criminal

prosecution is pending) is, clearly, a tolling to further a state interest.

However, such an interest is not limited to a state interest. It does not take a stretch of the imagination to realize that the same scenario could develop during a federal criminal prosecution that might involve federal law enforcement. A policy of tolling a potential civil rights action, whether a § 1983 or Bivins-type action, while a federal criminal prosecution was pending would serve both the interest of the government and the potential plaintiff simultaneously. The § 1983 policies of compensation and deterrence would be served, and so would government interests in precluding civil discovery and use of a civil action as a bargaining chip while a criminal action is pending.

Courts should not unravel state limitation rules unless their full application would defeat the goals of the federal statute at issue. Hardin v. Straub, 109 S.Ct. 1998 at 2000 (1989). If by "unraveling," the Supreme Court means dividing tolling, revival, application and limitation provisions, and selectively choosing among them, the Ninth Circuit decision appears to be in unison with this caution in that it does not peel off the state's tolling provisions but, rather adopts them. In recognizing preemption of the prohibitory provisions -- of bringing a civil rights action while a criminal prosecution is pending -- as a consequence of the Supremacy Clause, the appellate court did not unravel the state's limitation rules. Rather, it preserved the coordinate tolling rules while only dropping the

prohibitory language which, considered in itself, was clearly inconsistent with the policies underlying the § 1983 action. Such "unraveling" of the state's statute (California Government Code Section 945.3) that this may be is not an unraveling of the state's limitation and coordinate tolling rules, but, rather, their adoption. Contrary to representation, but according to actual fact, it is the Petitioners and Amicus who are attempting to unravel the states' rules of repose in the case at bar by "decoupling" the statute of limitations from its coordinate rule of tolling. Moreover, the practical effect of the Court of Appeal's decision in Harding will obviously further the state's own policy behind its statute (by limiting, if not precluding, civil discovery and bargain-chip leverage while a criminal

prosecution is pending). It is highly improbable that the majority of § 1983 actions of this sort would be brought simultaneous to any criminal prosecution, but much more likely (as a pragmatic consideration of resources, convenience, unnecessary litigation, etc.) that such actions would be brought only subsequent to the criminal prosecution.

The appropriate state statutes of limitations and the coordinate tolling rules are, in the first instance, posited by the state as a legislative choice. They become binding rules of law unless they are negated or vetoed as being discriminatory or inconsistent with the Constitution and laws of the United States. In the case at bar, Petitioner's interpretation would require us to defer to the state's intention in mixing and matching of state statutes of limitations

and tolling provisions regardless of discriminatory effect. This formula would clearly be unwise. It would open the door to the state being able to place prohibitory/tolling provisions in codes in a manner that could discriminate against the federal civil rights statute. By disengaging a tolling provision from the Wilson v. Garcia determined limitations period, the state could obviate its application to federal causes of action or contrapositively limit its application to creative legislation of state causes of action. However, it should be apparent that the determinant of what is a "coordinate tolling rule" should not be its chronological or spatial location within a state's statutes, but rather the functional linkage the tolling provision has to a limitations period in a particular case.

As noted in Felder v. Casey, 108 S.Ct. 2302 (1988), the avoidance of potential state discrimination against the federal Civil Rights Act was one of the primary purposes in selecting a state's general personal injury period of limitations as the one to be applied in § 1983 actions:[9] However, in the case at bar, Petitioner does not merely advocate a form of discrimination however detrimental to the federal right between types of defendants. (See, Felder, p. 2310), or between applicable procedures depending on which forum the action is

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[9]"In Wilson, we held that, for purposes of choosing a limitations period for Section 1983 actions, federal courts must apply the state statute of limitations governing personal injury claims because it is highly unlikely that States would ever fix the limitations period applicable to such claims in a manner that would discriminate against the federal right." Felder, p. 2310.

tried, but here advocates direct discrimination against the federal cause of action itself, regardless of whether said cause of action is pursued in a federal or state forum.

To attempt to differentiate or discriminate in this manner between the federal Civil Rights Act and the analogous state causes of action not only undermines the state policies underlying the state prohibition and tolling provisions, (as well as has the practical effect of undermining the federal policies of compensation and deterrence equatable with the § 1983 cause of action), but sets up a paradigm to discriminate against federal causes of action that might successfully evade or obviate the Supremacy Clause. By not imposing an affirmative discriminatory burden on the federal cause of action,

but by limiting application of a beneficial tolling provision solely to the analogous state cause of action, a form of discrimination is presented that does not run afoul of the Supremacy Clause because something cannot be pre-empted that has not been posited. Moreover, the State of California, as a practical matter, following Petitioner's philosophy, would wind up with the best of "both possible worlds" in terms of maximizing the goal of restricting and obstructing remedial causes of action against governmental persons and/or agencies.

**E. Section 935.3 Was Not Severed As Alleged By Amicus.**

As noted in the summary of argument, amicus have apparently confused constitutional invalidity with the doctrine of preemption under the

Supremacy Clause. Section 945.3 remains valid for any purely state law applications. The prohibition provisions were not severed from the tolling provisions. Under the operation of the Supremacy Clause, the prohibition provisions simply have no effect.

Amicus further argues that the legislature would not have enacted the tolling provisions of the statute had it known that the prohibition provision would fall under the Supremacy Clause. This statement implies Amicus' belief that the legislature intended that Section 945.3 be a coordinate tolling provision of Section 340.3 as applied to § 1983 actions. By establishing a cause and effect relationship between what the legislature would have done had it anticipated preemption, amicus is, in effect, admitting the legislature's

intent that the two statutes be coordinate. If the legislature intended that the two statutes not be coordinate then they would be unconcerned with any impact of the Supremacy Clause and would have enacted Section 945.3 in any case as purely state law legislation. Moreover, the legislature must be presumed to have been aware of the § 1983 action and the 1980 Supreme Court Tomanio decision when it enacted this legislation in 1981 and, again, amended it in 1983.

It is probable that the legislature intended the tolling provisions to be severable. The language of the tolling provisions as well as its isolation in a separate paragraph confirm this. The tolling provisions, other than incorporating a definition of the word "actions," does not make any reference to the prohibition provisions, but purports

to stand alone as an independent tolling rule.

Amicus' statement that the Court of Appeal's sustaining of the remaining valid tolling provisions would accomplish a result different than that intended by the legislature is also untrue. The tolling provisions standing alone, as noted by the Ninth Circuit's Opinion, independently promote the state's policies underlying the legislation. They encourage a complainant to wait until after the criminal proceeding has terminated and, therefore, further the state's objectives of limiting bargaining levers and restricting discovery into prosecutorial information.

Just because the tolling clause is independent does not mean that it is not related to the prohibition clause. Its relationship to another clause, which

takes the optional tolling a step further by positing a mandatory prohibition rule, does not preclude the tolling aspect from standing alone. While Amicus would have this Court believe that the two provisions are inextricably intertwined, with the former [the tolling] entirely dependent on the latter [the prohibition], in fact, just the opposite is true. It is precisely the prohibition clause that is entirely dependent on the tolling clause and that could not stand alone. The prohibition clause, by itself and on its face, would be invalidated, not preempted, as an unconstitutional violation of due process.

As one studies Amicus' argument it becomes clear that the Ninth Circuit was cognizant of and properly applied the law concerning severability. "Unless it is evident that the Legislature would not

have enacted those provisions which are within its powers, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932).

## IV.

## CONCLUSION

It is clear from the color and tenor of Petitioner's arguments that it is treating the State of California statute of limitations and the coordinate tolling rules as a technical obstacle to be circumvented if possible. The Petitioner's petition would certainly undermine the substantive policies underlying the State of California's tolling rule. Following their advice, § 1983 actions not only could be used as

bargaining chips, but would be so used and would open the door for civil discovery -- the two precise affects and practices that the State of California expressly wanted to eliminate in the enactment of Government Code Section 945.3.

If § 1983 actions must be prosecuted within the general personal injury statute of one year, while concurrent criminal proceedings are transpiring, then, a fortiori, neither a state nor a federal court would be in any position to stay the civil rights proceedings pending resolution of the criminal matter. It would be a technical farce for a requirement to be laid down that a civil rights action must be <u>filed</u> within a one year general personal injury period, and not tolled pursuant to a state's express tolling rule governing analogous state

actions, but then stayed during the period any state/federal criminal proceedings are pending to avoid waste of judicial resources, bargain chip and discovery tactics, not to mention the impossible practical difficulties presented to the § 1983 Claimant in defending against a criminal prosecution while simultaneously trying to prove the guilt of his accusers in the civil proceeding.

If it is against federal policy -- the Supremacy Clause -- to prohibit the filing of a civil rights action pending resolution of a criminal proceeding arising out of the same incident, then it is equally against that clause to stay a civil rights action that has been filed pending resolution of the criminal proceeding. To permit the latter (the staying of the civil rights action),

while requiring the filing, reduces the § 1983 filing to an absurd and technical act. If the policy arguments which underlie the § 1983 action -- compensation, deterrence, broad access to the courts for remedial action, etc. -- are strong enough considerations to disallow the prohibition of the action, then they are strong enough considerations to disallow the staying of the action. To allow "staying" would undermine the disallowance of prohibition and reduce all of the policy arguments in favor of the latter to the absurd.

On the basis of the foregoing, Respondent respectfully asserts that the Petition For Writ Of Certiorari be denied. If, on the other hand, it is granted, then Respondent respectfully asserts that the decision of the Court of Appeals ought to be affirmed to the

extent that it found Respondent's complaint to be timely under the tolling provisions of Section 945.3, and reversed to the extent that it found the "prohibition" provisions of Section 945.3 to be preempted by the Supremacy Clause.

DATED: January 18, 1991

Respectfully submitted,

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89-1772

Supreme Court, U.S.
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No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1989

DAVID GALCERAN and ED TEEL,
*Petitioners,*

VS.

EDWARD JOSEPH HARDING,
*Respondent.*

**On Petition for a Writ of Certiorari to The United States Court of Appeals For The Ninth Circuit**

## BRIEF OF AMICUS CURIAE CITY OF VALLEJO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF PETITIONERS DAVID GALCERAN AND ED TEEL

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DAVID GALCERAN and ED TEEL,
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## BRIEF OF AMICUS CURIAE CITY OF VALLEJO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF PETITIONERS DAVID GALCERAN AND ED TEEL

Amicus curiae City of Vallejo respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the proceeding on November 16, 1989.

## INTEREST OF AMICUS CURIAE CITY OF VALLEJO

This Section 1983 statute of limitations case is of interest to all California cities. The Board of Directors of the League of Califor-

nia Cities has, therefore, recommended that all California cities support the petition for writ of certiorari in this matter.[1]

Amicus curiae City of Vallejo ("City") is a charter city located in Solano County, California. City is appellee in *Forrester v. Dart*, United States Court of Appeals for the Ninth Circuit No. 89-15723. The resolution of *Forrester* turns, in large part, on the applicability of California Government Code Section 945.3 to Section 1983 actions. In the district court, the Honorable Thelton E. Henderson granted the City's Rule 12(c) motion for judgment on the pleadings, ruling that the statute of limitations barred plaintiff's action. Since the plaintiff was not subject to the restriction of Section 945.3, he could not make use of its tolling clause. Plaintiff appealed to the Ninth Circuit; *Forrester* was briefed and awaiting oral argument when the decision below was issued on November 16, 1989.

The City desires to present arguments not raised below or in the petition for writ of certiorari. Foremost of these is the inconsistency of the decision below with decisions of this Court regarding the severability of statutes. The uncertainty engendered by the decision below regarding the time period for filing Section 1983 actions diminishes much of what this Court has accomplished in recent opinions concerning this subject..

For these reasons, amicus curiae City of Vallejo and the joining amici curiae respectfully pray that a writ of certiorari issue to review the decision below.

## SUMMARY OF ARGUMENT

This Court has established a rule of severability when certain parts of a statute are unconstitutional. If the invalid part is severable under this Court's standard, then the constitutional portion may stand while the unconstitutional part falls. Where it

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[1] The following California cities have, as of this date, formally requested to join the City as amici curiae upon the recommendation of the League of California Cities Board of Directors and Legal Advocacy Committee: Cities of Alameda, Burlingame, Lafayette, Monterey, Moraga, Orinda, Pittsburg, Pleasant Hill, Turlock and Vacaville.

is not possible to separate the unconstitutional part from the rest, as here, the whole statute must fall. This Court has determined that partial invalidation is improper where it would be contrary to legislative intent. The key inquiry is whether the legislature would have passed the constitutional part of the statute had it known that the rest was invalid.

The decision below severed a California statute after holding a part of it unconstitutional under the Supremacy Clause. The Ninth Circuit did not apply the relevant rule, or even discuss severability, as it severed the statute. If the Ninth Circuit had applied this Court's rule regarding severability, the court would have determined that the statute is not severable. The statute must fall in its entirety because the California Legislature would not have enacted the valid part had it known that the rest would fail to pass Constitutional muster.

For this reason, as well as those stated in the petition for writ of certiorari, amicus curiae City of Vallejo respectfully requests that a writ of certiorari issue to review the decision below.

## ARGUMENT

### The Court Should Grant the Writ Because There Is A Conflict Between The Decision Below And Decisions Of This Court Concerning Severability Of Statutes

Where certain parts of a statute are held to be unconstitutional, the validity of the rest depends upon whether the Legislature intended the statute to be severable. If so, the objectionable portions are void, and the rest of the act is valid. Where, as here, to sustain the remaining valid portion would accomplish a result different from that intended by the California Legislature, the whole must be declared invalid. In this case, California Government Code Section 945.3 is invalid in its entirety as it applies to Section 1983 actions. To hold otherwise would accomplish a vastly different result from that intended by the California Legislature.

This Court's standard for determining the severability of an unconstitutional provision focuses on the intent of the legislature.

"Partial invalidation would be improper if it were contrary to legislative intent in the sense that the legislature has passed an inseverable Act or would not have passed it had it known the challenged provision was invalid." *Brockett v. Spokane Arcades, Inc.*, 472 US 491, 506 (1985). The Court was addressing, as here, the standard for a federal court to apply when considering the severability of a state statute.

The Court explained that "[t]his standard is similar to that which we would apply in determining the severability of a federal statute: 'Unless it is evident that the Legislature would not have enacted those provisions which are within its powers, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *Brockett*, supra, at p. 506, fn 15, citing *Buckley v. Valeo*, 424 US 1, 108-109 (1976), quoting *Champlin Refining Co. v. Corporation Comm'n.*, 286 US 210, 234 (1932). This Court's standard for determining the severability of an unconstitutional provision is well established: it is largely a question of legislative intent. *See Alaska Airlines, Inc. v. Brock*, 480 US 678, 684 (1987); *Regan v. Time, Inc.*, 468 US 641, 653 (1984). Thus, the applicable standard for severability has been clearly articulated.

It is indisputable that the decision below severed California Government Code Section 945.3. "Accordingly, as applied here, the prohibition in paragraph 1 of section 945.3 must fall under the Supremacy Clause. . . . It does not necessarily follow that the one-year statute of limitations for Section 1983 actions should not be tolled by the tolling rule expressed in Section 945.3. . . . Therefore, the tolling provision does not fall under the Supremacy Clause and should have been applied to Harding's Section 1983 claims against the Deputies." *Harding v. Galceran*, 889 F2d 906 (9th Cir. 1989). (Appendix A, p. A-6 of petition for writ of certiorari.)

It is equally indisputable that the Ninth Circuit did not apply this Court's rule regarding severability. The court below did not even discuss the issue of severability. The City respectfully submits that the failure to apply this Court's standard for determining severability renders the decision below fatally defective. A

writ of certiorari should, therefore, issue to review the decision below.

If the Ninth Circuit had applied this Court's standard for determining severability, Section 945.3 would undoubtedly have fallen in its entirety. As set forth above, the relevant inquiry is legislative intent. "The legislative history established that the purpose of Section 945.3 was 'to eliminate the use of civil damage complaints as plea bargaining levers.' [*Mohlmann v. City of Burbank*, 129 Cal.App.3d 1037, 1043 (1986), quoting Assembly Office of Research Mem. dated July 10, 1981.] The Legislature concluded that many criminal defendants filed frivolous suits against officers involved in their prosecution and then used the suits as bargaining chips in plea negotiations." *McAlpine v. Superior Court*, 209 Cal.App.3d 1 (1989). Section 945.3 was designed to eliminate this problem, not to give civil rights plaintiffs more time to file. Section 945.3 was also intended to prevent the use of false arrest suits as a device to inquire into prosecutorial materials and investigative information while the criminal charge is pending. *Mohlmann*, supra at p. 1042; *McMartin v. County of Los Angeles*, 202 Cal.App.3d 848 (1988).

The California Legislature's intent is evident. The Legislature would not have enacted the provision suspending the running of the statute of limitations independent of the temporary denial of access to court. The two provisions are inextricably intertwined, with the former entirely dependent on the latter. There is absolutely no evidence nor any reason to believe that the Legislature intended to give Section 1983 plaintiffs more time to file their complaints. To the contrary, the California Legislature's intent was to limit mischievous lawsuits by criminal defendants. Section 945.3 was intended to further local government's interest in protecting itself from liability and its processes from interference.

The California Legislature's intent is also clear with respect to tolling. The relevant California tolling doctrine is found in California Code of Civil Procedure Section 352. *Hardin v. Straub*, ____ U.S. ____, 104 L.Ed 2d 582, 589, fn 8 (1989). A separate and distinct coordinate tolling rule is not to be found in a subsection of the California Tort Claims Act. Any other conclusion is plainly inconsistent with the intent of the California

Legislature. The tolling subsection of Section 945.3 was not intended by the Legislature to be California's coordinate tolling rule. Rather, this subsection was intended to have a narrow and specific purpose: to provide those persons temporarily barred by Section 945.3 from bringing state law claims with additional time to file them.

The first published opinion considering this issue observed that the plaintiff "appears to maintain that the tolling clause contained in Section 945.3 constitutes a distinct tolling rule upon which he may rely, notwithstanding the Court's holding that Section 945.3 does not apply to this action. The argument is unsound . . . plaintiff may not prevail upon Section 945.3's tolling clause without having been subject to its disabilities. To hold otherwise would permit words and phrases to be plucked from statutes as if they existed in a vacuum." *Mangels v. City of Orange,* 678 F.Supp. 1452, 1455 (C.D. Cal. 1988). Judge Rea found support for this position from Judge Learned Hand: "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." *Mangels,* supra, citing *NLRB v. Federbush Co., Inc.,* 121 F.2d 954, 957 (2nd Cir. 1941).

The City agrees with the Ninth Circuit to the extent that Section 945.3 must fall under the Supremacy Clause. The whole statute, however, must fall rather than merely one nonseverable part. The decision below is analytically unsound and inconsistent with the dictates of this Court.

## CONCLUSION

California Government Code Section 945.3 is not severable. The decision below is inconsistent with decisions of this Court regarding severability of statutes. The Ninth Circuit has created needless uncertainty in an area where this Court has spoken recently in an effort to establish certainty. For these reasons and those in the petition for writ of certiorari, amicus curiae City of Vallejo respectfully requests that a writ of certiorari issue to review the decision below.

DATED: June 8, 1990

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